Access to Legal Services by the Disabled

Report of a Study by
Judge Rosalie S. Abella

Ontario

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Ontario

Judge Rosalie S. Abella
Chairman
R. S. G. Chester
Counsel

Study of Access to
Legal Services for
The Handicapped

416/598-0411

22nd Floor
180 Dundas St. W.
Toronto, Ontario
M5G 1Z8

June 1983

The Honourable R. Roy McMurtry
Attorney General
18 King Street East
Toronto, Ontario
M5C 1C5

Dear Mr. Attorney:

I am honoured to submit to you the report of the Study into Access to Legal Services by the Disabled.

Yours very truly,

STUDY STAFF

Chairman: Judge Rosalie Silberman Abella

Counsel: R.S.G. Chester

Researcher: Peter Bernhardt

Summer Research Assistant: Sharryn Aiken

Secretary: Eric Stine

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CHAPTER I

ACCESS TO LEGAL SERVICES AS A BASIC RIGHT

There is no more powerful measure of a society's quality than the way it treats its disadvantaged. It takes no great sensitivity or insight to accommodate the needs of the majority. These needs, largely basic and obvious, merely compete for degrees of implementation. The unique needs of the disadvantaged, on the other hand, compete for simple recognition.

The benefits of meeting social needs defined as basic by the majority are universal and undeniably positive. They service all members of society. They ensure that institutions fundamental to a modern community are in place - transportation, communication, health, housing, education, culture and social services. These systems enjoy varying levels of public support. The prevailing economic and political climate determines the extent to which each receives the financial resources it needs.

But none of these networks is ever seriously threatened because of lack of public interest or concern. Each of us can appreciate that we either need directly the services each system provides, or that the general welfare of other members of the community requires that they be provided. We accept as axiomatic that most of these services, though expensive, are worth the costs. Their benefits are tangible, their limitations are surmountable, and their absence is unthinkable.

There is, however, another less readily apparent kind of social need, but it too is vital to the integrity of the community. It is the need for basic "rights" - an admittedly abstract term which defines the claims an individual may assert to enjoy freedom of access to the services accepted as basic by the majority. Because these rights determine the extent a person's dignity is recognized and respected, they are arguably as critical as institutional systems.

It is unacceptable for any society to develop services intended for everyone's benefit to which some people have limited or no access. What can possibly justify the exclusion of any person from what most members of society feel are indispensable amenities? If the service was created for all and it exists for most, it cannot be allowed to be unavailable to a remaining few. To accept the absence of universal accessibility in a service meant to be universally accessible, is to accept as given that society is entitled to be arbitrary in the allocation of primary services.

This is a proposition that would be anathema to most Ontarians. We have made every effort over the years to ensure that services are universally available. Schools, health care, social services - all operate on the principle that those who need the service should have access to them. Efforts are constantly made to maintain or expand service levels to reach as many members of the public as possible. There may be fluctuations in these efforts as economic pressures impinge more or less severely, but our basic commitment to the principle of accessibility has never been seriously questioned.

From time to time, however, different members of the public have pointed out that they have been unable to obtain what is available to others. This may be due to factors of gender, religion, language, or disability. These factors are usually obvious; their effect as barriers is not always so. Nor can the barriers always be removed. But any negative effects can and should be neutralized.

Where the barriers have been ignored in the past through lack of awareness, or have not been responded to because of gaps of information rather than gaps of goodwill, they are understandable. But when the issue once identified, is presented for remedial action, inactivity is intolerable. The speed with which these matters are resolved depends on numerous factors such as perceptions of urgency or financial exigencies. It depends, too, on a responsive factor - where a community genuinely believes in equality of access to society's opportunities, the government is more likely to respond quickly. Where no such consensus exists, government is left to decide whether or not to lead and educate by example.

The failure to grant equality of access derives usually from an uninformed rather than a malevolent public. But the denial of equality threatens not only the minority it excludes from the possibility of integration, it threatens too the well-being of the majority. Insensitivity breeds insensitivity. To be unconcerned with the needs of our contemporaries, is to be destructive of the future of the community. Those members of minorities who now watch the seemingly effortless movements through the community of others, may one day themselves become intolerant in their frustration. Ultimately, if we do not act, we will have to deal with their bitterness, impatience, anger and cynicism - emotions which attract the same response in the persons against whom they are directed. The circle will become vicious, the problems insoluble, the social lines drawn, and all members of the public victimized by the sense that solutions are not possible.

It is an avoidable prospect. Once the issues have been brought to our attention, we must respond intelligently, effectively, and sensitively.

The rights of people, rather than concern for the economic repercussions of tolerance, should be the guiding principle. The tendency to restrict allocation of funds for human rights during difficult economic conditions must be resisted.[1]

We have long acknowledged, and now have constitutionally entrenched in the Canadian Charter of Rights and Freedoms,[2] the concept that people are equal before the law regardless of such characteristics as racial origin or disability. These rights are to be respected because they are inherently worthy of protection.

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[1] See The Ontario Human Rights Commission, Life Together - A Report on Human Rights in Ontario, (Toronto, Ontario, 1977).

[2] The Constitution Act 1982, c. 11 (U.K.), Schedule B.

Despite sincere efforts not to discriminate, some people are still not getting their share of what has been designated as being for their benefit. It is an illusory or cerebral satisfaction for an intended beneficiary to know that a benefit exists in the abstract. Unless he or she can get to it, it is a hollow right. Making services available to hitherto unrecognized constituents does not require us to expand our commitments as a society, but merely to implement our current commitments. We are not creating new rights, we are fulfilling existing ones.

Access to legal services should be regarded as a right. The establishment of the Ontario Legal Aid Plan reflects a policy decision that persons who need lawyers should be able to hire them, whether or not they have financial means. This is in turn a reflection of a generally held view that the services of lawyers are so vital that obstacles to them should be reduced. There is not yet, however, the recognition that this right is universal, but this should change. Everyone who needs a lawyer should have one. Why should legal services be available to some and not others, particularly if we accept how important a role they play in today's society?

What makes the right to legal services critical is that it is the means by which other rights are enforced. The principle to which we remain devoted, namely, that in a democratic society we have fundamental rights guaranteed by law, is a chimera without a concomitant ability to enforce these rights. And if the ability to enforce depends to some extent on our ability to gain access to a lawyer, then everything should be done to ensure that nothing impedes this access. Rights exist for all. All should therefore have the right to their enforcement.

This should be the goal in establishing delivery systems for legal services. The importance of lawyers lies in their ability to translate laws into remedies. Through access to lawyers people gain access to laws and legal remedies.

Laws require impartial application. Just as no one sees himself or herself as beyond the reach of the law, so the law should not seem to be beyond anyone's reach.

We have been moving in this direction for a number of years. The reason for this movement is that, despite new systems and laudable intentions, there continue to be members of the public who have little or no access to legal remedies or legal services. No one is deliberately setting out to deny them access. The problem seems rather to be a failure of creative foresight. There is still a gap between the expectation and the reality.

It is not enough to provide a service. The results of the existence of the service determine its efficacy. It may be accessible to some, but not to others. It must therefore be changed, drastically if necessary, to make sure that it is accessible in fact as well as in theory. The intention to establish a service which does not discriminate is not by itself sufficient if the administration of the service results in its unequal application.

Differences cannot and should not be ignored or glossed over. In the delivery of the law to the public, we must be aware of the diverse society it regulates and serves, and create channels to match the diversity of need. Not everyone may want to take advantage of the service. As long as the reason the service remains unused is a conscious choice rather than lack of access, we will have succeeded in developing an appropriate model.

Anyone in this province who needs legal services should have access to them, regardless of financial, communication, or physical barriers. To deny access to legal services is to deny at the outset access to the law. To deny access to the law is to deny justice, and to deny justice to some, is to threaten the integrity of all.

CHAPTER II

THE LEGAL NEEDS OF THE DISABLED

The terms handicapped and disabled are used interchangeably throughout this Report. I am aware that there is a minor unresolved debate over which term is more appropriate and that there are variations in human rights statutes over what disabilities are included in the general category. In the context of this study, it would be unproductive to enter the semantic debate, particularly since neither term is consider pejorative, offensive, or even inappropriate. Nor does the specific disability matter - so long as the disability has an inhibiting effect on the individual, it is worthy of remedial attention.

For purposes of this Report, the terms disabled and handicapped are meant to include those persons in Ontario who have physical or mental disabilities which interfere with their ability to do readily those things which non-disabled persons do readily.

Although this definition may appear to be a tautology, in its simplicity it is intended to ensure that all who need the service will get it. It recognizes that since our physical and social environments have been created largely to accommodate those without disabilities, those with disabilities have been arbitrarily, albeit unintentionally, excluded from things we take for granted. The purpose of my general definition is to minimize wherever possible the impact of the differences between persons with and without disabilities. Insofar as it is possible, a disability should not be allowed to prevent an individual from participating fully in society.

For no one are the problems of access to legal services as severe as for the physically and mentally disabled.[3] Added to the difficulties anyone else might have are the additional problems of mobility, communication, isolation and a parochial public attitude. And these obstacles are in addition to the financial hardship and lack of information which have traditionally impeded access to legal services. All of these impediments combine to make legal services practically unattainable for a significant number of disabled persons.

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[3] "Obstacles." Report of the Special Committee on the Disabled and the Handicapped. (Ottawa, Ontario, February, 1981).

It may be thought that in a global serse, legal services are not a major priority for disabled persons. Perhaps compared to the problems of coping with poverty, fighting the ignorance of the public, or even just getting through a day, legal services may seem relatively unimportant. But the persons and organizations who gave me the benefit of their views made it very clear that they considered access to this service to be extremely important. At its simplest level, it was perceived as one of an enormous number of areas which the public tended to take for granted, but which was not equally available to disabled people.

It has been a major undertaking on the part of handicapped people to encourage those who are not disabled to understand the desire for integration on the part of those who are. With increasing urgency, the disabled community has insisted that it not be consigned to facilities, institutions or agencies which are separate and apart. What it wants instead, are adjustments to the basic services provided by society to adapt to the range of disabilities. Only this kind of approach avoids the invidious and humiliating need to function on the fringes of the community. Disabled people want to be treated not as persons who are unable to participate fully in society, but as persons who are prohibited from participating by an unaccommodating society. Not only are they willing to participate, they properly consider it their right to participate. They cannot understand why this simple and self-evident right produces so much literature and so relatively little action.

It is true, however, that the political process has started to respond positively in word and in statute. There is a greater public awareness certainly than even a decade ago of the needs of disabled persons. The new Ontario Human Rights Code[4] makes disability a prohibited ground of discrimination in broadly defined terms, mandates equal treatment, and defines the reasonable accommodations which must be made for handicapped workers. The Canadian Charter of Rights and Freedoms[5] has articulated as public policy their equality rights. Building Codes have been passed, transportation systems are being redesigned, and relevant government agencies have been put in place. Yet to the community all these efforts are made to serve, the sense is overwhelming that the efforts have been insufficient. To the disabled person who has spent practically his or her whole life struggling to achieve both a public perception and a private sense of normality, and who has been handicapped by environmental inaccessibility from achieving them, it is a strange and unacceptable argument that there is not enough money to make the adjustments which will give him or her the same rights everyone else enjoys. If there is no money for human dignity, on what do we purport to spend our public funds?

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[4] Ontario Human Rights Code. R.S.O. 1980, c. 340 (as amended by S.O. 1981, c. 53).

[5] The Constitution Act 1982, c. 11 (U.K.), Schedule B.

In addition to legal services being seen as an area which, like many others, require revision as part of a general equalization and integrationist policy, they were specifically viewed by the people I heard from as the main machinery to be used in achieving this equality and integration. Access to legal services means access to the mainstream and integration.

On a number of levels, legal services were seen as crucial. Through assistance provided by these services, disabled persons could get access to other existing services. Through informed advocacy, governments could be encouraged to change or expand services. And through the legal process, rights could be further defined and developed in the courts. In other words, access to the law through legal services meant access to the enforcement of rights. As the primary vehicle for guaranteeing to disabled persons that they can get at least that to which they are entitled, legal services are vital.[6]

As they are currently being delivered, however, legal services do not begin to meet the needs of disabled clients. That there are enough lawyers qualified to meet the needs of the general public is undisputed. If anything, one hears concerns about a surfeit of law graduates who are unable to find employment in the practice of law. This is, however, only a superficial conclusion. Despite the apparent abundance of legal professionals, there is still, for the disabled community and undoubtedly for other disadvantaged persons, a great unmet need for qualified legal assistance.

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6. Disability Rights Education and Defense Fund, Inc. (DREDF). Law Reform in Disability Rights, (2 vols.) (Berkeley, California, 1981).

The Lawyer and the Disabled Client

Almost every disabled person or group I met with agreed that there were immense difficulties in finding, retaining and using a lawyer. Even if they had enough information to know that they needed a lawyer's services, they often didn't know where or how to find a lawyer. If they could get a lawyer's name, they sometimes couldn't make personal contact because of their particular disability. This frequently resulted in having to rely on intemediaries such as neighbours, friends, or relatives. This assistance might have been appreciated, but it infringed on a person's right to have a private professional consultation with a lawyer.

If the disabled person is able to contact a lawyer, he or she must then ascertain whether the lawyer's building is physically accessible. If the building is accessible, are the facilities within the lawyer's office, such as washrooms, also accessible? Will the lawyer appreciate that the disabled client may be late because the public transportation system provided for the disabled client is unpredictable in schedule?

If the client cannot hear, will there be a qualified, independent interpreter or will he or she again be forced to bring in a cooperative friend or family member to translate essentially private communications? If the client cannot see, will the lawyer have time to read and explain every relevant document?

And after the initial interview, how will the client and lawyer be able to communicate with one another? Will the lawyer understand the need to put everything on cassette if the client is blind? Will there be sensitivity to the need to simplify for all clients the concepts and terminology, particularly if the disability has resulted in limited educational opportunities?

Will the lawyer disregard the views of a client who appears to be mentally disabled or will he or she take instructions in the usual manner? If uncertain about whether the client is capable of understanding the nature of the process in which he or she is entangled, to whom will the lawyer go to clarity the issue of capacity? Will it be a person somehow involved with the client who may or may not have opposing interests, or will it be someone independent? Who will teach the lawyers to be aware of these problems associated with physical and mental disabilities in order to protect both lawyer and client from the embarrassment and awkwardness of confused expectations? And who will pay for all this?

We must start from the basic premise that a client who is disabled is entitled to the same quality of service as anyone else. That means that the service must be delivered by someone who is competent and independent, and who has the proper educational qualifications.

In addition, the lawyer should be qualified to handle the type of legal problem raised. The fact that there is even a debate over specialization indicates that the Law Society understands that the public wants to be able to feel confidence not only in the integrity of the lawyer, but in his or her ability to deal skilfully with the particular problem at hand.

For the disabled client, knowing a lawyer's special expertise is a major requirement. The client often lacks the physical or emotional ability to change from lawyer to lawyer until an adequate professional can be found. This may mean either settling for an inappropriate lawyer, or deciding not to pursue the remedy.

The frustration and difficulty any of us would find simply irritating in seeking the right lawyer could, to a disabled client, be insurmountable. We cannot ignore the fact that many disabled people feel isolated and relentlessly inhibited by the inaccessibility of the rest of the community. We must continually remember that there may be a different level of tolerance for those who are not disabled and those who are. Conditioned by experience to feel that society is not always as forthcoming as it could be, the disabled person may give up a lot earlier in the process than would someone for whom easy access is taken for granted.

There should be no question of disabled individuals giving up in frustration because the system has not been adequately designed for them. Once the needs of the disabled have been identified, the system should be adapted accordingly. This means opening the lines of communication between the legal profession and a constituency in need of its services. And this, in turn, means educating both groups to prepare them for each other. The disabled person needs to know when to turn to a lawyer and the lawyer needs to know what to do when this client arrives.

Special mechanisms will be required if our legal system is to provide equal levels of service and access for the disabled. In this, they differ markedly from other minorities. One American judge put it well, when he said,

> "Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class...The physically disabled employee is clearly different from the non-handicapped employee by virtue of the disability...Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities."[7]

Special mechanisms should not, however, be seen as ghettoization. They are consistent with the principle of integration.

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7. Holland v. Boeing Co. 583 P (2d) 621. (Wash. Sup. Ct.).

CHAPTER III

THE TRAINING OF LAWYERS

The Law Schools

The problem of gaining access to legal information concerning the law affecting the handicapped is not one faced by the handicapped alone. A law student at one of the six Ontario law schools who has an interest in the legal problems of the handicapped may be compelled to pursue that interest on a private basis. No law school in Ontario offers a course affecting the handicapped person, or deals with the difficulties that a lawyer might encounter in acting for a handicapped or disabled person. Throughout three years of legal education, a law student might receive a minimal familiarity with the defence of insanity within the criminal law, some problems in the law of estates affecting the mentally incompetent and perhaps review some of the issues involved in the overlap between the disciplines of psychiatry and law. None of this comes close to being an adequate preliminary examination of the legal problems of the handicapped.

Indeed, little instruction on the law relating to the disadvantaged generally is offered.[8] Not enough is done to encourage law students to pursue study in less traditional areas of the law. Although the law schools did make some effort during the Sixties and Seventies to respond to social change by introducing courses on women's rights, poverty law and clinical training, only clinical training survives with any security. Those students interested in the other areas of the law affecting the disadvantaged are often relegated to extra-curricular organizations, while the formal curriculum reflects both a more traditional approach to legal education.

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8. Each of Ontario's six law schools offers courses on human rights or civil liberties which may, to a limited extent at least, touch upon the law as it relates to the disadvantaged. In addition, courses dealing with children's law, women and the law, workmen's compensation and native rights are available to most law students. Aside from a small number of courses concerned with social issues and the law, further attempts to teach a knowledge and awareness of the legal problems of the disabled are negligible. Even courses labeled "Law and Psychiatry" or "Medical Legal Problems" are chiefly concerned with forensics and the law of malpractice. Perhaps the most effective way in which law students are exposed to the issues and problems concerning the disadvantaged is through the various clinical programs offered by all Ontario law schools, which allow students to participate in the provision of legal services to individuals who cannot afford a lawyer.

The areas of law promoted as relevant today are by and large those promoted as relevant years ago.[9] I concede that these traditional areas will always continue to be relevant and even essential to a balanced legal education. But they are not the exclusive elements of this education. For a law student to spend three years in law school, his or her first contact with the profession, and see so little offered on the curriculum that reflects the gradations of needs for legal services, little that signals the importance of law as a social tool, little that inspires a willingness to serve clients that lawyers do not easily serve, little that discourages a perception that society is homogenous and has consistent and harmonious interests - all this is to encourage a parochial approach in student mind that could otherwise be expected to stretch in whatever legal directions are offered for study.

The role of the law school in our university and professional systems is to educate the future lawyer not only in important legal principles, but in ways of thinking and acting. No one denies the importance of this instruction in the ability to isolate, analyze, understand and solve legal issues. Lawyers graduate overwhelmed by principles, perceptions, and paradigms. Lawyers also usually graduate with the desire to implement and put to use the lessons taught. They have been channelled to think of certain ways of thinking as traditionally acceptable, and have little opportunity in the first years following graduation to challenge or test these philosophies. They are too busy, now that they have learned what to do, learning how to do it.

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[9] "Law and Learning", Report of the Consultative Group on Research and Education in Law, (Ottawa, Ontario, 1983).

In other words, if something is not encouraged as important or appropriate during law school, the chances are that it will only become so with considerable effort. On the other hand, if something has received the approbation of the legal education system, the chances are that it will be displaced only with the same considerable effort.

Many law students attend law school committed to avoiding traditional career routes, or anxious to participate as lawyers in any one of a number of social reform movements. Many of these students are encouraged by the faculty, but many others either do not seek this support or draw their own conclusions from their educational environment. In either case, the message is clear from the absence of courses in areas they had entered law school to learn.

It is understandable if they assume from these omissions of courses that they have chosen commitments to areas the profession seems not to consider important. These students are by implication made to understand that they will be operating on what are considered the fringes of the profession.

Law school is the first place in the legal culture in which they should be taught that there is inherent merit in pursuing legal endeavours on behalf of the disadvantaged. If it is not encouraged at the law school, the progenitor of the legal profession, the prospect that legal services will be generally available to all who need it is diminished. It is not inconsistent with a law school's intellectual obligations to train lawyers to be sensitive to the social contexts in which the law operates. By the example of its curriculum, the law school can strive to symbolize the values and goals of the ideal. It cannot fail thereby at least to touch all those future lawyers who pass through its stages. The law schools should not recoil from areas of law which lack the imprimatur of tradition. The law schools have a public as well as professional responsibility. The public anticipates the graduation of new lawyers in the expectation that as students they were educated to deal with a complete range of legal and social issues. Although lawyers are technically accountable to the profession through the Law Society, in a broader sense, their main accountability is to the public they were ostensibly educated to serve.[10]

The public is not homogenous. It has the right to expect that in the training of professionals who are expected to look after its needs, this diversity will be recognized. Any law school which treats as ephemeral the rights of minority groups by failing to teach their legal contexts, which fails to introduce to its student body the fact that different groups have distinct and compelling legal problem, fails in its responsibility to the public.

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[10] See Report of the Professional Organizations Committee, (Toronto, Ontario, April, 1980); also Evans and Trebilcock, eds., Lawyers and the Consumer Interest (Toronto, Ontario, 1982).

Post Law School

The need to educate lawyers about the particular legal needs of disabled clients does not end with law school. In the programs of the Bar Admission Course, the Continuing Legal Education Courses run by the Law Society and by the Canadian Bar Association, laudable initiatives have recently been taken to acquaint practitioners with some of the areas of law which most directly affect a handicapped person.

The most recent Bar Admission Course, for example, contained a voluntary three hour seminar on the problems of representing the mentally disabled.[11] But as yet, not enough has been done to alert lawyers to those unique aspects of the solicitor-client relationship which are present when the client has a severe physical or mental disability.[12] Without education on how to elicit instruction from a client who has a developmental handicap, or on how to communicate with a client who has visual, oral or auditory disabilities, even the best-intentioned lawyer will be unable to deliver effectively the legal services he or she wishes to provide. To ensure that the quality of legal services given to a disabled client is as good as possible, lawyers should know not only what substantive legal advice to give, but also must know how best to give it.

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[11] Bar Admission Course, Law Society of Upper Canada, Mental Health Workshop - Acting for a Mentally Ill Client. (Toronto, Ontario, 1982-83).

[12] Mickenberg, "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals." 31 Stanford Law Review (No. 4) 625. (April, 1979).

For those in practice, the only way of familiarizing practitioners with the specialist law of the handicapped is through practical experience. There has been very little written in legal journals on these questions. There are no Canadian texts dealing comprehensively with the law of the handicapped. It is not therefore surprising that there is a dearth of experience and expertise in the legal profession generally in recognizing the specialist problems of the handicapped and in acting effectively for such clients.

The Bar Admission Course as the last compulsory stage in a lawyer's educative development, should therefore contain mandatory instruction on those aspects of the solicitor-client relationship with which a lawyer acting for a disabled client will have to be familiar. This will make lawyers better able to function professionally with these clients, will dispel some of the unwarranted and inaccurate mythology attached to handicapped persons, and will teach lawyers where to turn for more specialized and comprehensive assistance should they need it.

For the same reason, Continuing Legal Education Courses should offer instruction on acting for clients who have mental or physical disabilities.[13] A substantial number of Ontarians have these handicaps and are entitled to expect that the legal community can provide professional assistance to them as well as to anyone else. Not every lawyer will be expected to deal with disabled clients, but there is no reason why every lawyer should not at least be sensitive to the client and the issues. The more familiar the profession is with this clientele, the less intimidated it will be in acting for it. And if this demystification occurs, more lawyers will be encouraged to train themselves to be able to act professionally for a handicapped client. They will come to understand that a client who is

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13. See, for example, Baker, Essential Duties, Reasonable Accommodation and Constructive Discrimination: The Evolution of Human Rights Protections for the Handicapped in Ontario (Law Society of Upper Canada Human Rights Programme, Toronto, Ontario, June 14, 1983) and the Canadian Bar Association Continuing Law Institute, "Law and the Handicapped," a program held in Toronto, Ontario, April 29, 1983.

disabled is a client who has the same need for legal services as any other client, but may need from the lawyer an extra measure of cooperation, awareness, or sensitivity to make the connection between the client's need and the lawyer's response.

CHAPTER IV

AN OVERVIEW OF PRESENT SERVICES

During the course of this study, we met with a number of representatives of the handicapped and disabled communities. They have had a variety of experiences in seeking legal services. It would be unwise to try and generalize on the basis of those experiences. Whether or not a handicapped person will be able to obtain adequate legal services will depend on the nature of his or her disability, the type of legal problem, the individual's geographic location within Ontario, and his or her financial situation. What is clear, however, is that there is a largely unmet need for legal services.

Of all the factors which may affect the ability to obtain legal services, financial resources are arguably the most critical. A client willing and able to pay will be able, in almost all cases, to find a lawyer willing to act. But such resources are not available to most handicapped Canadians.

The Parliamentary Committee on the Handicapped and Disabled in its report "Obstacles" described graphically the disproportionate numbers of the handicapped who are below the poverty line.[14] For many handicapped persons, legal services are seen as critical in the movement to advance the status and interests of the handicapped. Through informed advocacy, and through legal structures, society can better be moved to adapt its environments to the handicapped, the special needs of the handicapped be better seen in terms of rights and not charity, and the goal of equality can better be realized.

The Ontario Legal Aid Plan

The Ontario Legal Aid Plan is the province's major vehicle for delivering legal services to those who lack the economic means to retain a private lawyer. The plan was a pioneering attempt to make law more accessible. Ontario still enjoys a plan that is virtually unparalleled. However, the plan has not been immune from

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14. Indeed, statistical measures of poverty often fail to make allowances for extraordinary expenses directly related to an individual disability. According to ARCH, 43% of the welfare population is handicapped, 62% of those receiving disability payments under the Canada Pension Plan live below the poverty line, and 80% of the handicapped are unemployed.

the pressure of increased demand and insufficient funds which have affected most public and quasi-public services. Thus, the plan has had to scrutinize even more closely the types of cases for which Certificates will be granted. Criminal legal aid remains the highest priority. From what I heard in the course of this study, handicapped persons charged with criminal offences have little more difficulty in engaging defence counsel through the Legal Aid Plan than any other group, though there may be serious barriers to their effective representation once they receive a Certificate.

In civil cases, the pattern is much less clear. The non-criminal Certificate work of Legal Aid tends to be concentrated almost exclusively in the Family Law area. This emphasis on Family Law cases has resulted in there being very few Certificates granted for non-Family Law civil cases. Yet these are the types of cases which are of significant concern to the disabled. Moreover, for cases involving transportation rights, special education provisions,[15] vocational rehabilitation

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15. An Act to Amend the Education Act, S.O. 1980, c. 61.

entitlements, or the provisions of the Mental Health Act,[16] the average lawyer on a Legal Aid Panel will have no specialist knowledge or experience. Often, the law affecting the handicapped is highly technical and specialized, and requires specialized mechanisms for the delivery of legal services.

Community Legal Clinics

It is in partial response to the recognition that there was a need to deliver specialized services to particular communities that Legal Clinics were established. These are now funded on an on-going basis by the Clinical Funding Committee. There are now 41 Clinics across Ontario, funded by the province through the Clinic Funding Committee of the Law Society. Each Clinic is community controlled, with a Community Board in full control of its priorities and policies.

Although general community legal clinics have expressed an interest in becoming more involving with the legal problems of the handicapped and the disabled, there are factors which limit the ability of the clinics to assume a primary role for the delivery of these legal services. At present, virtually all legal clinics are operating at the very limits of their capacity. Caseloads have so burgeoned that in many clinics there is simply no capacity to take on significant amounts of extra case work. Indeed, we were informed that at least one clinic dealing with the specific problems of disabled workers has had to turn clients away. Any move to transfer additional burdens to the clinics without corresponding increases in resources would be unfair, unrealistic and counterproductive.

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[16] R.S.O. 1980, c. 262.

The scarcity of resources in the clinics has led them to become inaccessible to handicapped clients in other ways. For example, at a time when all government expenditures have been under a very close scrutiny, strict controls have been kept on the amount allocated for renting premises, or for making capital improvements to such premises. The limits have been so severe that a number of clinics have had to relocate in premises above stores, or in older buildings, which tend to be inaccessible to the non-ambulatory handicapped. In addition, funds have not been generally available for the installation of telecommunication systems for the deaf (TDD), nor expanded funds for outreach and home-visit services. The Clinic Funding Committee should establish a one-time Special Handicapped Access Improvement Fund, to enable clinics to make the necessary structural alterations to their premises to promote greater accessibility.

The Advocacy Resource Centre for the Handicapped

Three years ago, a proposal was made to the Clinic Funding Committee to fund the Advocacy Resource Centre for the Handicapped. This is the first specialist legal clinic in Canada wholly devoted to serving the legal needs of the handicapped and disabled.

One of the most valuable features of ARCH is the extent to which its Board is broadly reflective of the interests and concerns of the handicapped themselves. Twenty-three different organizations representing and serving the handicapped are active participants on ARCH's Board of Directors. In a very real sense, the policies and priorities of ARCH have been decided by the handicapped community. Seven separate committees look after matters such as administration, long range policy, legal education, review of individual cases, finance, personnel, and fund raising. Throughout this study, I have been made continually aware of the immense value of the work that ARCH is doing. Since its establishment, ARCH has opened over 250 client files, and has provided legal representation for the disabled involving a broad range of problems and before an impressive number of courts and tribunals.

However, ARCH's value goes far beyond this individual advocacy. Through its training programs, public legal education, and issue advocacy, ARCH has focussed greater public and professional attention on the legal needs and problems of the handicapped. It is ARCH's long term and totally supportable goal to move towards becoming a research, reform, and information organization as the specific advocacy needs of the handicapped are "mainstreamed" and thus integrated into the conventional pattern of legal services.

ARCH deserves to be strengthened and encouraged in its work. It has provided exceptional leadership in a new and difficult area of the law, and will undoubtedly constitute a cornerstone for the future development of the delivery of legal services to the handicapped in Ontario. At the same time, I am keenly aware that ARCH remains a relatively small organization centred in Toronto, and that it would be unrealistic to expect it to take on a vastly expanded range of responsibilities, or to have it serve as the sole focus for the delivery of legal services to the handicapped and disabled.

Other Organizations

A variety of organizations now exist which have as part of their mandate the promotion of the rights of the disabled through the legal system. I would like briefly to describe three of them. In singling these three organizations out, I do not wish to denigrate the excellent work being done by others, but these three do represent in a sense illustrations of structures that might usefully be employed in the further development of delivery systems for legal services to the handicapped.

CLAIR is the acronym for Canadian Legal Advocacy Information and Research of the Disabled. This organization was established following the National Conference on the Law and the Handicapped in August, 1981.[17] One of the major resolutions adopted at that conference was that there should be a national legal resource unit coordinating and developing the activities of various provincial bodies and work toward improved access to the legal services system for all handicapped

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17. See National Legal Aid Research Centre, Preliminary Study for a National Conference on the Law and the Handicapped (Ottawa, Ontario, 1980), and Israel, co-ordinator and McPhedan, Summary of the National Conference on Law and The Handicapped (Ottawa, Ontario, 1980).

people at the national level. CLAIR's board is drawn from all parts of Canada, and is representative of a wide range of disabilities. Initially the organization received funding from the Department of Justice.

CLAIR is not a direct provider of legal services: rather, its aim is to act as a resource to those delivering legal services, and to act as a coordinator of the developing network of organizations of disabled consumers, legal research and education organizations.

It has adopted the following aims and objectives: to serve as linkage among organizations of disabled consumers, legal research and educations, and organizations providing services to disabled people in legally related areas; to ensure that disabled individuals involved in potentially precedent-setting cases receive adequate assistance from the appropriate legal services and community organizations; to promote and carry out research into legal issues of particular importance to disabled Canadians; to promote and carry public legal education programs targeted at legal professionals and the general public; to provide a resource to legal service professionals and organizations on legal issues of concern to disabled people; to assist consumer advocacy groups of disabled people to address the legal concerns of their members; to promote the establishment of training programs that would facilitate greater involvement on the part of Canadians with disabilities in the legal service system; to ensure that wherever feasible, programs focussing on the legal needs of disabled people are implemented by generic legal service organizations; and to identify legislation that requires changes and advise advocacy groups of disabled people in the efforts to lobby for the necessary changes.

CLAIR's work is in its infancy, and the organization is still trying to obtain permanent funding and status. However, it has identified vitally important objectives, and would be an essential vehicle for coordinating the various efforts made across Canada to identify the legal needs of the disabled, and to assist them in meeting those needs. Although most of these matters fall under Provincial legislative jurisdiction as part of the administration of justice, there is a very real need for national standards, national funding guarantees, and mechanisms for the exchange of information and experiences. CLAIR will, I am sure, play a very significant part in providing a national perspective, and facilitate the creation of a national network for the handicapped which can shape and direct the provision of legal services.

The Research Education and Advocacy Centre for the Handicapped (REACH) is based in Ottawa. It differs markedly from other existing services such as ARCH, in that it is an attempt, at the local level, to promote a network of private lawyers willing to act for the handicapped on a *pro bono* basis. REACH does not provide direct service itself, but rather refers clients to private lawyers. It has a unique and most interesting relationship with the Carleton Law Association, the organization of lawyers practicing in the Ottawa area. It has been built upon a reservoir of goodwill within the private bar, and enables a number of practitioners to increase their familiarity with the law relating to the handicapped and disabled. In addition, REACH conducts an ongoing series of programs aimed at educating the public as to the legal and social problems experienced by the disabled, including a ten-lecture course on the rights of disabled persons.

REACH represents an experimental approach which indicates that much more can be done to involve the private bar in the provision of legal services through the provision of *pro bono* advice and advocacy. REACH has received no government funding but requires financing for such minimal operating needs as the purchase of books, the reproduction of information, and the payment of office operating expenses.

The third project that I wish to describe is a "Law and the Handicapped" project in Kingston, set up under the auspices of Queen's Legal Aid at the Faculty of Law, Queen's University. The Project is not a legal assistance scheme as such. Rather, it intends to heighten awareness of the law, and the legal dimensions of other problems, among disabled persons. The Project also works with agencies whose major clientele consists of the handicapped, providing them with background legal assistance. The Queen's Project is an interesting one for two reasons: firstly, it shows the potential contribution that may be made by properly supervised students, and secondly, it shows that the students themselves are interested in this area of law, and would profit from the learning experience that could be had in the clinic. During the next year, the Project on Law and the Handicapped will be fully integrated into the working structure of Queen's Legal Aid, so that all students within the clinic will be able to handle a disabled person's file. This will involve the building up of information and research concerning the particular legal needs of the disabled. The clinic is also in the process of embarking on an outreach program and plans to have evening sessions in an accessible office in a community centre one evening a week.[18]

These spontaneous initiatives are excellent, and deserve to be further developed elsewhere in Ontario. However, even taking into account the contribution of the private bar, the existence of the specialist legal clinic for the handicapped, the network of other legal clinics and services across Ontario, and the existence of the Ontario Legal Aid Plan, it is nonetheless true that delivery systems for legal services for the handicapped remain dangerously partial and fragmented. A society which has enshrined in its basic constitutional document a commitment to guaranteeing the equal protection of the law to all, and to outlawing discrimination on the basis of physical and mental handicap or disability,[19] has an equal obligation to deliver services to the handicapped and disabled in a real and effective way. There are currently legal needs in this community which go totally unmet, and perhaps more extensively, legal problems which go unrecognized as such because there is no ready access to legal advice and assistance. A myriad of obstacles and barriers confront handicapped and disabled Canadians who seek access to legal services.

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[18] In the United States, the National Center for Law and the Deaf has used over forty specially trained law students to work on the various projects of the Center, and these students receive for this work; National Center for Law and the Deaf, Final Report (Washington, D.C., March, 1978). Goldberg, The National Center for Law and the Deaf Report on Clinical Services (Washington, D.C., 1982).

[19] Canadian Charter of Rights and Freedoms, s. 15, The Constitution Act 1982, c. 11 (U.K.), Schedule B.

Psychiatric Patients

The situation of the mentally disabled patient within psychiatric institutions poses unique problems. These individuals may be more in need of advice and assistance with respect to their legal rights than those mentally disabled persons in the community. Yet because of the inaccessibility of the psychiatric hospitals, together with difficulties in making contact with lawyers, few individuals in such institutions have ready access to legal advice or assistance.

Recent changes have been made within the psychiatric hospitals which may go some way towards remedying this deficiency. Community Advisory Boards reporting directly to the Ministry of Health have been established so that the psychiatric hospitals can be more responsive to their immediate communities. Secondly, an experimental psychiatric patients' advocate project has been established very recently in Ontario. To discuss the role and functioning of the project, it is necessary to give some background. In 1978, the Provincial Mental Health Act[20] underwent a total reform and modernization. Additional safeguards were introduced to ensure that the rights of the mentally disabled were better protected, and that decisions to commit involuntary psychiatric patients were made after a strict review by competent authorities applying specified statutory tests.

Those concerned with the interaction of psychiatry and the law discern two alternative approaches to the commital process. These approaches may be characterized as the medical model and the due-process model. Before 1978, patients who had been involuntarily admitted to a psychiatric hospital, or whose admissions had been renewed were entitled to a hearing before the Regional Review Board. The Review Board's hearing was relatively informal and unstructured. Those who argued that involuntary admissions affect the liberty of the subject, and that therefore strict standards of due process should apply, were able to persuade the Legislature to import into the provisions of the Mental Health Act two sections which provided such due process safeguards.

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[20] R.S.O. 1980, c. 262.

These sections, Sections 66 and 67 of the Mental Health Act[21] have not yet been proclaimed. Section 6 requires an attending physician who completes a Certificate of Involuntary Admission or Renewal to give notice in writing to both the patient and the Legal Aid Area Director; the patient is further entitled to a hearing by the Regional Review Board. Section 67 sets up a formal court style procedure for the Regional Review Boards to follow.

The Minister of Health has expressed his concern about the need for due process and the need to have patients better informed of their rights. However, the Ministry believes that better alternatives exist than Sections 66 and 67. To this end, it has recently announced that an experimental network of Patient Advocates will be established for each of the ten provincial psychiatric hospitals. This network constitutes a compromise between the existing system, and the formal legalistic procedure contemplated by Sections 66 and 67. It synthesizes the medical and due process models, and attempts to deal with the rights of patients in a non-adversial manner.

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[21] Ibid.

The Patient Advocate has been described as a "patient friend" who acts as a mediator with the hospital staff, and serves as a liaison between the patient and other persons such as lawyers, doctors, or employers. He or she is responsible for investigating and resolving "in-patient" concerns about legal, medical or personal problems. The responsibility is to act as a link between patients and their rights and the services to which they are entitled. While the advocate is to follow strictly the patient's instructions, he is not a legal representative as such. If the problem cannot be negotiated, it may be necessary for the advocate to make a referral to a lawyer or to another professional.

Their role is to advise the patient and the patient's family about the status of rights of the patient, the hospital policy, appeal routes, changes in the patient's status, access to the Review Board, and the availability of legal aid. In addition, they are to conduct personal counselling and ensure that the patients understand their legal rights and what to expect at Review Board hearings. The advocates are also to act as contact points for referrals to Legal Aid lawyers.

Because the project is an experimental one, the advocates will also be required to make recommendations to hospital administrators and to the Ministry's Mental Health Divisions. The Ministry of Health has established an Advisory Committee on the Rights of Psychiatric Patients which will work with Dr. Tyrone Turner, the Coordinator of the Ministry's Psychiatric Patient Advocate Office.

It is too early to make any firm judgments about the Psychiatric Patient Advocate system. While the initiative has sound objectives, the patient advocate has an extremely delicate and difficult role, which will require a great deal of balancing between the various affected interests. Neutrality and independence will be vitally important if the patient advocate is to be seen as a true safeguard for patients' rights. The Project will undoubtedly provide useful guidelines for the development of a permanent system of law advocates and patient advocates not only for the ten provincial psychiatric hospitals, but also for the sixty-five psychiatric units in general hospitals across Ontario.

An earlier model of an intermediary scheme for protecting the rights of the handicapped and disabled was established in 1972, and now operates under the general heading of Adult Protective Service Worker (APSW) Program. To date, there are 121 programs throughout the province, under the auspices of 72 generic sponsor agencies such as community colleges, children's aid societies, and municipal welfare authorities. The APS Workers are giving support in one form or another to nearly 5,000 clients. All APS Workers are employed and supervised by local or specialized mental retardation agencies which are funded for this service by the Ministry of Community and Social Services.

The goal of the Adult Protective Service Worker Program is to enable mentally disabled adults living within a community setting to lead lives as independent as possible, within their particular community setting; secondly, to ensure the provision of social support services necessary and appropriate to the individual's needs by using a variety of general and specialized services; and lastly, to enhance the process of integration of mentally disabled adults by developing and maintaining a partnership network of adult protective services from a variety of relevant agencies. The Workers provide advocacy services, case management, counselling on financial or emotional matters, help in obtaining accommodation or health care, short term handling of money matters, and community outreach.

The Adult Protective Service Workers Program is highly decentralized and responsive to local needs. While the primary responsibility of the APSW is the provision of social and community services, the APSW's can be used to identify individual legal problems, and to connect clients with legal resources.

Legal Information

Perhaps one of the most critical obstacles to access to legal services is the current status of legal information provided to the handicapped and disabled. Here again, individual groups have made significant contributions such as the publications on law and the handicapped produced by the March of Dimes. However, more needs to be done, and more systematically, if the handicapped and disabled population is to be made aware of its rights, and the remedies available to it.

Steps are being taken to make legal information more widely available. Pamphlets written in non-technical language can play a useful part. So too, can community legal education courses. Such courses could specialize in topics of particular interest to the handicapped and be widely advertised within the handicapped community. In addition, current public legal education courses should have sign interpreters present and be routinely conducted in facilities accessible to those with mobility handicaps. Special outreach efforts will also have to made to bring such courses to the disabled within institutions. Entire areas of specialist law affecting the handicapped have not been translated into linguistic and conceptual formats readily accessible to the handicapped. Television and radio programs giving legal information are virtually non-existent. In all respects, sufficient public information about the law is not being made available to the handicapped and disabled in Ontario.

Physical and Communication Barriers

Even for those handicapped who may recognize that they have a legal problem and persevere until they have a lawyer, the system presents many barriers. Physical barriers are simply the most obvious. Few lawyers' offices are readily accessible to those in a wheelchair. While we have no comprehensive statistics, one illustrative submission which was made to us revealed that in one small Ontario town, five lawyers' offices out of seven in the community were totally inaccessible to those in wheelchairs. Surveys have been conducted in Niagara Falls, Hamilton, and Toronto, which indicate similarly that lawyer's offices are inaccessible because of steps, lack of ramps, inaccessible elevator controls, and narrow doorframes.

Court buildings are rarely any better. Although the Ministry of the Attorney General has made efforts in recent years to modernize and make accessible the court buildings across Ontario, often the buildings themselves, generally of great antiquity, prove impossible to economically retrofit for accessibility.

New court buildings are supposed to be accessible in accordance with Part 5 of the Ontario Building

Code.[22] However, a recent inspection by members of the Ontario Advisory Council on the Physically Handicapped of the new St. Catharine's Courthouse revealed that simply meeting the Building Code Standards would not make a court facility accessible in meaningful and satisfactory terms. Access ramps were too steep, witness and jury boxes had steps leading up to them, braille signs were lacking, and sound monitors for FM hearing aids were not provided for. Greater efforts should be made by those responsible for the architecture and design of court facilities to consult with the handicapped to develop satisfactory standards for access to justice buildings.

Currently, ad hoc arrangements are made for the provision of deaf interpreters in our courts systems. In the Criminal Courts, the deaf are treated in the same way as those linguistic communities who do not understand the language of trials. When a need is identified either by the Crown or the defence that an interpreter is required for the accused or for a witness, an interpreter is contacted by the court staff and is in due course paid out of government funds. The system is highly informal, relying on personal contacts and the cooperation of organizations of the deaf, particularly the Canadian Hearing Society and the Reverend Bob Rumball Centre for the Deaf, which have generously provided extensive volunteer services for many years.

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[22] R.R.O. 1980, Reg. 87. Part 5 of the Building Code, however, sets out only a bare minimum and does not represent a satisfactory standard of accessibility.

In Civil Courts, interpreter services are thought to be the responsibility of the parties. The rationale for this appears to be that the conduct of civil litigation is primarily a dispute between two parties, and does not involve state interests. However, there is no check on the reliability of these services, or the professional competence of a particular interpreter to handle the specialized vocabulary and procedures of trials.

While we have no data that would indicate the number of occasions on which interpreters have been required in civil litigation in the province, last year there were 62 requests for deaf interpreter services in the Provincial Courts in Toronto, and 159 outside Toronto. From these figures, it can be seen that there is a need for some sort of more formalized system of dealing with these requests.

An additional factor has been introduced by Section 14 of the new Canadian Charter of Rights and Freedoms which provides that: "a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter". As yet, there has been no case law to define what is meant by "proceedings", and whether the right to an interpreter thus extends to civil litigation. However, a strong argument can be advanced that just as ramps are necessary for those with mobility handicaps to have access to the courts, so deaf interpreters are necessary if the deaf are to have access to the courts.[23]

The Canadian Charter of Rights and Freedoms

Throughout this Report, I shall make reference to the provisions of the new Canadian Charter of Rights and Freedoms.[24] Many of the Sections of the Charter will be critically important to the handicapped in coming years as they seek to advance their claims to equality and independence. For the institutionalized, Sections 7 & 9 are clearly relevant. Section 7 provides that everyone has the right to life, liberty and security of the person and the right to not be deprived thereof, except in accordance with the principles of fundamental justice. Section 9 provides that everyone has the right not to be arbitrarily imprisoned. For the deaf, Section 14, which provides a constitutional right to the assistance of an interpreter, will obviously be critical. The precise impact of these sections upon the legal situation of the handicapped has not yet been fully determined.

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[23] Du Bow, et al., Legal Rights of Hearing Impaired People, National Center for Law and the Deaf, (Washington, D.C., 1982).

[24] The Constitution Act 1982, c. 11 (U.K.), Schedule B.

Section 15 of the Charter of Rights and Freedoms deals with equality rights. It states that "every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on...mental or physical disability." A separate sub-Section saves affirmative action programs. Section 15 of the Charter does not come into force until 1985[25], but when it does, it will have the effect of providing a ground of challenge to all legislation and programs that discriminate in some way or other against the handicapped or disabled. Provisions that offend the Charter may be rendered inoperative, and a broad range of constitutional remedies provided. Starting in 1985, the disabled will have a potent weapon in litigation to challenge discriminatory legislation or practices.

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[25] Ibid., s. 32(2).

One reason why the Charter has remained unexplored is that Canadian law is currently ill-equipped to provide vehicles for citizen suits or general litigation involving rights. In the United States, many cases involving the rights of the handicapped affect large numbers of people, and are thus brought as class actions.[26] Except in Quebec,[27] Canadian law is deficient in not providing an effective vehicle for large numbers of affected individuals to bring their claims as a class action. Earlier this year, the Supreme Court of Canada in the case of Naken v. General Motors[28] decided that effective class action laws could only come from legislative reform. In Ontario, a very considerable study was published last year by the Ontario Law Reform Commission[29], which recommended that Ontario should have a modernized and effective class action procedure. Such a class action procedure would obviously be of considerable benefit to the handicapped and disabled.

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[26] Herr, The New Clients: Legal Services for Mentally Retarded Persons, (Washington, D.C., 1979), pp. 69-106.

[27] Loi Sur Le Recours Collectif, S.Q. 1978, c. 8.

[28] Naken, et al. v. General Motors of Canada Ltd. et al. (1983), 144 D.L.R. (3d) 385. (S.C.C.)

Two recent cases, those involving Justin Clark and Stephen Dawson have focussed public attention upon the rights of the handicapped in relation to legal procedures. It is beyond the express mandate of this report to consider these two cases in detail. Nevertheless, they do demonstrate a number of problems that exist in the present law: the uncertainty regarding the test of mental capacity, the uncertain roles of the Official Guardian and the Public Trustee, the unexplored _parens patriae_ role of the Attorney General, and the problem of a barrister's potential personal liability for costs if his or her client is found to lack capacity. The Clark[30] case too marked the first time that a Canadian court had received testimony through the medium of Blissymbolics, which is a special communication system, developed in the last decade to permit communication by and with those who have severe speech or muscular dexterity problems.

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[29] Ontario Law Reform Commission, _Report on Class Actions_ (Toronto, Ontario, 1982).

[30] _Clark_ v. _Clark_ (1983), 40 O.R. (2d) 383.

The Dawson case[31] concerned a seven year old severely mentally retarded boy who required remedial surgery to which his parents did not consent. The Superintendent of Family and Child Service sought custody of the child on the basis that he was "in need of protection", so that he could receive the necessary medical attention. The Supreme Court of British Columbia in its judgment granted custody to the agency and thus permitted the operation to proceed. This decision focussed public attention on the competing interests of the parents, the disabled child and the state. The issue of how best these competing interests can be represented and balanced will undoubtedly be the subject of further study and of future litigation.

As is clear from this chapter, much of value is being done. New and promising developments are taking place. Experiments in new forms of advocacy are taking place. But there is a danger that all these will be insufficient because they are uncoordinated and fragmented, because they tend to be concentrated in large urban centres and because they rely on the dedication and commitment of a relatively small group of individuals with limited resources and tremendously high caseloads. Ontario needs a more coordinated approach to the provision of legal services for the handicapped. We also need to build upon existing networks and to make use of the goodwill and expertise that reside in the legal profession. And we need adequate resources for all these tasks.

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[31] Superintendent of Child and Family Services v. Robert Dawson and Sharon Dawson, (March 18, 1983), British Columbia Supreme Court (not yet reported).

CHAPTER V

PUBLIC LEGAL SERVICES IN ONTARIO

Only comparatively recently have formal structures for providing legal services to the disadvantaged in Ontario been put in place. The introduction of the Legal Aid Plan[32] in 1966 was followed by the development of the Community Legal Clinic system in the 70's. Today these two systems represent the bulk of this kind of structured delivery method. In 1974, Justice John Osler submitted a comprehensive Task Force[33] report dealing with the state of legal aid services in Ontario and recommended future changes. In 1979, Justice Samuel Grange[34] dealt with the state of Community Legal Clinics and made positive recommendations as to their continued existence. Both of these reports stressed the need to provide adequate legal services to disadvantaged persons in Ontario who were increasingly in need of access to affordable lawyers.

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32. Report of the Joint Committee on Legal Aid (Common Report) (Toronto, Ontario, 1964.
33. Report of the Task Force on Legal Aid (The Osler Report) (Toronto, Ontario, 1975.
34. Report of the Commission on Clinical Funding (The Grange Report) (Toronto, Ontario, 1978).

Now, only four years after the Grange Report, and less than a decade after Osler's, the demand referred to in both documents has become a matter of some urgency.[35] For one thing, there are the obvious problems created by

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35. (Social Planning Council of Metropolitan Toronto Report on Legal Aid in Ontario as quoted by the Honourable J. Breithaupt, *Legislative Assembly of Ontario Official Report of Debates (Hansard)*, *Standing Committee on Administration of Justice*, Third Session, 32nd Parliament, June 15, 1983, p. J-154:p. J-154:

"The Ontario Legal Aid Plan has been undermined by financial eligibility criteria so restrictive that the concept of guaranteeing rights to legal services has changed into one of providing charity to the destitute. This is one of the major conclusions contained in a report on legal aid in Ontario released today by the Social Planning Council of Metropolitan Toronto.

The eligibility criteria are so stringent that many households living below the poverty line have incomes considerably higher than the maximum allowable limits for legal aid assistance, the council notes. In some instances, people of very modest means can be denied legal aid altogether.

The report also states that compensation to lawyers doing legal aid work has fallen seriously behind inflation. While revisions to the fee structure have provided base increase totalling 58 per cent, living costs during the same period have gone up three times that amount. The undercompensated lawyers participating in the plan also contribute 25 per cent of the cost of all accounts submitted. This represents a gross inequity which must be addressed immediately, the council states.

The report contains additional material which makes interprovincial comparisons between Ontario and the rest of Canada and concludes that this province's relative position has deteriorated in recent years. Finally, the report makes some observations on the situation in York County and concludes that there has been a actual discouragement of legal aid applications in the Toronto area in recent years."

financial constraints. The Legal Aid budget, despite increases in government funding, is perpetually insufficient. The Community Legal Aid Clinics which are attracting and assuming an increasingly large proportion of the legal services needed by the disadvantaged constantly confront frustrating limitations, both on resources and mandate, on their ability to serve their clients. Moreover, to complicate the picture further from the point of view of the consumer, an implicit understanding exists between the Clinics and Legal Aid to focus on particular caseloads - Legal Aid gives certificates for criminal and family law matters, whereas the Clinics deal with the remaining legal issues of the poor such as unemployment, social service benefits or representation before tribunals.

This division of legal services in this way to meet the legal needs of the poor is based on sound objectives.[36] The Clinics as relative newcomers in Ontario to the legal services system have only just begun to feel that they represent more than a passing phase in the evolution of this system. But in struggling to achieve both general acceptance and financial security, they carved out for themselves areas of legal services which were not generally being handled by the rest of the profession. Their vitality and their value lay in this unique contribution and in their independence.

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[36] Zander, "Public Policy for Legal Services" in, Innovations in the Legal Services, edited by E. Blankenburg (London, England, 1980).

The Clinic movement would probably not have survived in Ontario had it merely to duplicate the legal services currently available through Legal Aid or the private bar. The clinics provide in form and in legal substance a service completely different from that available from any other part of the legal profession. They have become, in less than a decade, an indispensable source of legal services for the disadvantaged people of Ontario. In order to ensure the continuity and to allow the clinics to achieve permanent level of consistency effective legal services, the allocation of funds to the Community Legal Clinics should be increased.

Legal Aid has understandably been no less vigilant in protecting its jurisdiction. Certificates are granted only for certain kinds of cases and then only under carefully defined circumstances. Legal Aid restricts its caseload and the areas of law it subsidizes in order to be able to assist those persons for whom the needs are most compelling. This results in a concentration on the areas of criminal and family law. Clinics similarly define their own mandate narrowly to ensure that they are able to provide effective legal services at least in specific kinds of cases.

Dilution of purpose, particularly when combined with limited time, staff and money leads almost inevitably to a dilution of the quality of service provided. Everyone acknowledges that there is not enough money to look after everyone's legal needs. The compromise adopted has been to divide the legal needs of disadvantaged people into defined categories, each of which is looked after by a different institutional branch of the legal profession. But this compromise is at best a temporary expedient: it does not constitute a rational solution.

In principle, this sort of specialization for the sake of efficiency is reasonable and practical. But in the context of the difficulties each system faces plus the undisputed fact that despite this process of specialization, a large number of Ontarians are still unable to gain access to legal services, more careful consideration is going to have to be given to the interconnection of these two systems. The focus of this study has not been to do a comprehensive analysis of how the disadvantaged generally fare in gaining access to legal services - that was not the mandate of the study. But some aspects of this lack of coordination and integration have an impact on the main focus of this study - the ability of the handicapped to get legal services.

Any conceivable problems of access resulting from the existence of two parallel and divergent systems for delivering legal services to the disadvantaged are exacerbated when the issue is examined from the point of view of the disabled client.

It may very well be that a more thorough analysis is premature. As the two systems evolve beside each other and beside the privately retained bar, issues and problems become increasingly apparent. So do solutions. It may be that for now, the present evolutionary process should be allowed to continue under the sensitive observation of the interested parties - lawyers, consumers and government. At some point in the near future, however, the problem of inaccessibility to legal services by the disadvantaged in particular and by the public generally may reach a critical stage. It is hoped that long before that crisis occurs, more up-to-date structured facilitative mechanisms, and institutions for delivering legal services will be found.

Among the general problems which could be considered are many which are in fact aspects of the particular problems affecting disabled clients. They include:

Clinic Specialization

Because of the demarcation of fairly clear boundaries between the community clinic system and the Legal Aid Plan, many potential clients who are poor fall between the service gaps. Clinics in Ontario are quite autonomous bodies which act under the policy direction of independent community boards of directors.

These boards with the concurrence of the Clinic Funding Committee, decide the client group for the Clinic, and what kind of legal service the Clinic will provide. That determination is based on discernible community needs. The Clinic is thus a body providing legal services to a given community based on community interests as defined by that particular community. This kind of locally inspired and responsive legal service is essential and should be encouraged.

However, in practical terms, the system has its limitations. An example will illustrate the point. What does a client do who cannot get a Legal Aid Certificate for his or her case before the Unemployment Insurance Commission? Where does this client, impecunious, go for legal assistance if the local Clinic has taken a decision to handle only landlord and tenant problems.[37] This situation is the fault neither of the Legal Aid Plan nor of the Clinic system. It is a byproduct of restricted service jurisdictions which are themselves a byproduct of restricted funding. When there is a fierce competition for economic survival, this kind of situation can only become exacerbated. The result is that more and more people will fall between the cracks of the legal services provided for the disadvantaged.

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37. This specialization does have a positive aspect in that it allows a clinic to develop a great deal of expertise in a particular area of the law. ARCH (The Advocacy Resource Centre for the Handicapped), is an example of one such clinic.

Underfunding

Lawyers in both systems are seriously underpaid. Legal aid fees are not realistic, and salaried clinic lawyers are on the bottom end of professional salary scales. It seems at times as if there is a myth that lawyers who act for the disadvantaged should be paid significantly less for their professional services. Realistically, lawyers who are paid from public funds may not be able to command the same fees as those paid by a wealthy individual or corporation to privately retained counsel. But to accept this as a practical matter is not to accept that lawyers paid from public funds should receive an unreasonably low rate of remuneration for their services. Legal aid tariffs and salaries for Clinic lawyers should be raised significantly to recognize the importance of the services rendered by the lawyer, as well as the reality of the expense involved in practicing law in Ontario.

In Ontario, not only are Legal Aid lawyers paid an unacceptably low tariff for their work, they face the additional and burdensome requirement that they must return to Legal Aid 25% of the meagre fee they have earned as a contribution to help finance Legal Aid. These are lawyers who by their willingness to act for disadvantaged clients make the Legal Aid system work. The system has the approval of the Law Society and thus of the profession as a whole. To place a major financial burden for the running of the plan disproportionately on the shoulders of the lawyers who get paid less than their privately retained colleagues who support the plan in principle is unjust. The 25% rebate to Legal Aid should be replaced by a more equitable distribution of the financial responsibility for Legal Aid among all members of the Legal Profession. An annual fixed contribution from each member of the Law Society to assist the Legal Aid Plan is far fairer, for example, than penalizing the lawyers who work on Legal Aid Certificates.[38] There are few enough incentives in the low Legal Aid Tariff without the additional penalty of a 25% automatic reduction. Lawyers should be encouraged to provide services for the disadvantaged. It is unfair to expect a lawyer's personal and professional sense of commitment to long survive a relentlessly inadequate income.

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38. During the course of the study, it was learned that the Ontario Legal Aid Committee is exploring the possibility of levying an assessment on all lawyers to be met by direct contribution of services or by cash payment.

The disadvantaged are entitled to quality legal services. It is hard to see where they will find them if lawyers are expected to jeopardize their solvency by acting for them. There will simply have to be more ways found to fund these services, such as pre-paid legal insurance plans,[39] to ensure that consistently effective legal services will be available to every member of the public who needs legal services. A right to legal services is meaningless without the possibility of getting access to them.

The Legal Aid Means Test

Most Legal Aid offices have clear guidelines on when and how to process a potential client. This means in each case that certain financial requirements must be satisfied - only persons below a certain net income level qualify for Legal Aid. At Legal Aid offices, this is determined by an intake officer who applies a "means" test to applicants for Legal Aid. The test is quite stringent to ensure that only persons who really need Legal Aid, get it.

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[39] See. C. Wydrzynski, "Access to Legal Services: the Emerging Concept of Prepaid Legal Services." (1979), 3 Canadian Community Law Journal 47.

There is, however, no provision in the "means" test to allow for the deductibility of certain necessary expenses by the handicapped. This results in an unrealistic appraisal of a disabled person's income. Certain of their expenses are unavoidable and vital to their functioning. To ignore these expenses is to overestimate the perceived income of the disabled applicant. This could possibly result in the unwarranted conclusion that there is too much income to allow the person to qualify for Legal Aid.

In the calculation, therefore, of the net incomes of disabled applicants, deductions should be allowed for those medical or other living expenses, whether regular or occasional, which are reasonably necessary to the physical or mental welfare of the disabled applicant. This could include the cost of mechanical equipment for a person with a mobility impairment or even the cost of maintaining a dog for the person with a visual disability. So long as the expenses are reasonably incurred as a result of physical or mental disability and are subjectively deemed necessary by the disabled person, they should be permitted to be deducted on a Legal Aid application.

Clinics and Certificate Applications

Clinics cannot process Legal Aid Certificates. With the exception of one clinic in Hamilton, persons who come to Legal Clinics cannot, without additional inconvenience, arrange to retain a lawyer from Legal Aid. This is a result of the strong wish of both Legal Aid and the Clinics to maintain very distinct kinds of legal services. There is no writtem requirement that these two forms of legal service have no procedural interaction. No statute or regulation sets out clearly the interrelationship between the Clinics and Legal Aid Offices. The strict separation is merely another aspect of the understandably self-protective history of their co-existence. Until a comprehensive study is done, changes could be made now to allow for more flexibility without jeopardizing the independence or uniqueness of either.

The flexibility is crucial for a handicapped client. Any such client who enters a local Clinic Office only to be told that his or her particular legal problem is not the type handled by the Clinic, would under the present arrangement likely be advised to contact or go to a Legal Aid office. Whereas for a person who has no disabilities this extra requirement constitutes at most a serious inconvenience, for the disabled client, it may mean that the legal problem may go unattended. To expect a disabled client to make a second or third trip, this time to a Legal Aid office which may not even be accessible, is to impose in many cases, an impossible obstacle in the way of access to Legal Services. For the benefit of this client, Legal Aid and the Clinics should be able to cross-refer as follows:

a) Legal Aid should designate at least one person in each Clinic as an Intake Officer for the purpose of processing applications for Legal Aid Certificates. This person would be an Intake Officer only for that Clinic and not otherwise generally available to Legal Aid. In other words, he or she would continue to be an employee of the Clinic, rather than of Legal Aid.

b) The means test would be given on the Clinic premises. If the handicapped applicant qualified for Legal Aid, a Certificate would be granted.

c) Initial contact with the lawyer chosen by the client would be made by the Clinic, probably from a list of specialist lawyers. (The concept of this list will be discussed subsequently in this Report.) An initial interview will be arranged through the Clinic, and the lawyer will be advised what special arrangements, if any, will have to be made to accommodate any communication or physical disabilities on the part of the new client. If the lawyer's office is physically inaccessible to a client with a mobility handicap, arrangements should be made, if the lawyer is willing, for the lawyer to interview the client at another accessible location or at the client's home.

In this way, the Clinics will not be made to provide services they have neither the time nor staff to give, but neither will the disabled client be deprived of access to legal services or information.

Mechanical Aids

In addition, there are a number of problems for the disabled client which exist with each of the two existing systems:

> All Legal Aid and Clinic Offices should be equipped with any mechanical devices necessary to provide services to a disabled client. These include

appropriate telephone equipment, access to interpreters, and physically accessible entrances, offices, and office facilities.

Disabled clients who qualify for Legal Aid should have the first interview with a lawyer arranged through Legal Aid, if they so wish, to ensure that the lawyer is told in advance of any possible physical or communication problem. This does not remove from the client the right to select counsel - it merely provides a safeguard against unnecessary frustration once the client has picked the lawyer.

Outreach Programs

Both the Legal and and the Community Legal Clinics should have an Outreach programme. There are some clients who are unable to travel easily as a result of a disability. For these clients who may be in need of legal services, two services could be provided:

a) It should be possible for this handicapped client to call a local Legal Aid or Clinic office to discuss what is thought to be a legal matter. This will enable both the client and the service provider to be satisfied that what is involved is in fact a legal problem. Whenever possible in these cases, intake should be done by phone.

b) If this potential client is not easily mobile, or if the Legal Aid or Clinic Office is unable to determine whether the person requires legal services, arrangements should be made either to have the lawyer sent to interview the client or to have another lawyer with more expertise in the particular area, call the client.

The purpose of these kinds of arrangements is to bring legal services to the client who cannot otherwise reach the legal service. The adjustments required to be made are not drastic - it involves setting up a system in each Clinic and Legal Aid Office to allow disabled consumers to utilize services which were intended for their benefit as disadvantaged members of the public, but were inadvertently not set up to allow them access. In addition, those clinics which are close to psychiatric facilities should consider organizing outreach programmes to reach this client group.

Physical Inaccessibility

Most Legal Aid and Clinic offices are physically inaccessible. A Committee of the Law Society recently recommended a number of changes to make legal facilities more accessible but to date, financial restrictions have delayed implementation.

It is inexcusable that facilities meant for the benefit of the public are not in all respects physically accessible to every member of the public. No Legal Aid or Clinic office should rent premises which are not or cannot be made fully accessible, not only as to the entrance of the building, but also as to any facilities such as washrooms or offices inside the building. No renewal of leased premises should take place unless there is an undertaking to make the premises fully accessible.

For this purpose a capital fund should be established by government which would exist solely for the purpose of subsidizing these renovations. This fund should be separate from any fund out of which remuneration for Clinic or Legal Aid lawyers is made. The physical renovations should not be at the expense of the availability of qualified legal services. It would be sadly ironic if in the effort to retrofit buildings to make them physically accessible to potential clients, we were reducing the number or quality of professionals to whom they could turn. These two aspects, the physical accessibility and the professionals to whom we are trying to get access, are indivisibly related. But they are not conflicting aspects and therefore should not be in competition for the same funds. The maintenance of neither aspect should be at the expense of the other.

Special Time Allowances

It often takes a lawyer longer to look after the legal needs of a disabled client. Legal Aid imposes tariff and time limits with respect to most kinds of cases. This imposes an additional and unfair financial burden on a lawyer who will have to read a document to a visually impaired client or talk through an interpreter to one who has communication disabilities. The former client may have to have all documentation put on cassette and the latter may require much more time in having legal principles discussed even with the assistance of an interpreter.

In any case where the disability of the client results in the lawyer having to take extended time in properly discharging his professional responsibility to his client, there should be no hourly limit in any tariff imposed by Legal Aid. The time spent should be determined by the lawyer according to the needs of the client. So long as the lawyer does not appear to have acted unprofessionally or unreasonably, there should be no arbitrary limit placed on the number of hours for which he or she can be paid by Legal Aid in acting for a disabled client. In addition, special allowance should be made for special reports and other services required for handicapped clients.

Independence, Autonomy and Specialization

Clinics are independent in fact and form from government. It is unthinkable that they should be otherwise. An independent bar and an independent judiciary are among the most important guarantees that the rule of law will be fair and impartial both in application and intent. In other words, independence is one of the safeguards of justice. It is no less significant a feature of a democratic society than is an accountable legislative body.

Members of the public have some right to expect that a legislature will attempt to be responsive to perceived community needs just as they do to expect that those laws, once passed, will be enforced fairly and not arbitrarily. People are at the same time dependent on government to pass laws necessary to protect the public, and dependent on an independent Bench and Bar to protect itself where necessary from government.

Just because Clinics receive partial funding from government does not make them, either in their own minds or in the minds of government, less independent. The Clinic Funding Committee and the local community boards to which Clinics are accountable are bodies which have both public and governmental input, and both are bodies extremely sensitive to the need on the part of the Clinics to feel independent. One of their most critical roles as Clinics should be to act as non-partisan advocates for clients. In acting for the disabled client, for example, a Clinic may wish to lobby for legislative change or to organize consumer lobby groups who wish themselves to challenge a law formally or informally. The Clinic and its staff must feel that in this advocacy capacity they are not subject to sanction through a withholding or reduction of funds.

In encouraging the Clinics to provide legal services for the disabled client, therefore, a method should be found which is sensitive to the need to maintain the existing autonomy. A method should be found, in other words, which does not take away from the local community boards the role of decision-maker in deciding what legal services the Clinic will provide.

The best way seems to be the establishment of a separate fund to be administered by the Clinic Funding Committee. The purpose of this fund would be to allow Clinics who so wished, to hire lawyers and lay advocates who will be able to meet the needs of disabled clients. These lawyers will have expertise in the laws relating to the handicapped and will as well be skilled in representing handicapped clients.

There is no need for this lawyer to spend all of his or her time acting for disabled clients. It will depend in each case on how many such clients any given clinic has. To the extent that this lawyer has time, he or she will be available to provide legal services to other Clinic clients. But a primary responsibility of this particular lawyer would be to provide legal services to disabled clients.

Any Clinic which wanted to be able to train existing lawyers or paralegals in the Clinic or to hire new staff to provide legal services to disabled clients would apply to the Clinic Funding Committee for the funds to have these kinds of legal services available in the Clinic. In this way an incentive is created to make Clinics more accessible to the disabled without having the Clinics feel that the delivery of legal services to one disadvantaged group is at the expense of another.

A Special Panel

Nothing should be done which interferes with a client's right to choose his or her own lawyer, or indeed the right not to choose a lawyer and thus to be left alone. Nor should a client have to retain the services of a lawyer who is unwilling or unable to deal with his or her legal problem. For this reason, the Legal Aid Panel is subdivided by specialty with lawyers listed according to their legal areas of expertise.

For the disabled client dealing with Legal Aid, there is need for further subdivision. For each lawyer listed, it should be indicated whether that lawyer's office is physically accessible or whether the office has equipment such as a Telecommunication Device for the Deaf.

An additional specialist panel should be designated by Legal Aid as well, indicating which lawyers have special training to act for handicapped clients or have specialized knowledge of the law of the handicapped. It should show whether the lawyer's particular area of expertise is in the area of mental or physical disability law. Any expertise in being able to act for clients with particular disabilities should also be noted.

The reason for this extensive classification system is to maximize the chances that a client will get quality legal services from a lawyer able personally and professionally to handle the client as well as the legal problem. In a service profession such as law, there must, in addition to an ability to provide the service, be a willingness to receive it. This prospect is enhanced when both lawyer and client can communicate with one another as easily as possible.

CHAPTER VI

A SPECIALIZED BAR

It was the hope of the disabled persons with whom we met, as well as that of their representative associations, that legal services for them would not be segregated. Their desire and expecation is that they should receive the same quality of service any other client would get - even though they are handicapped by certain physical or mental disabilities. They do not wish to find themselves ostracized from the mainstream of legal or any other form of services because of these disabilities. They rightly consider that their right of access to mainstream services is equal to that of anyone who does not have a physical or mental disability. Segregated legal services nourish the perception, both external and internal, that the disabled client is not entitled to this access. Separate may connote unequal, particularly to an individual who has consistently found that his or her disability has resulted in a denial of access to so many aspects of society non-handicapped individuals consider normal.

To be unable to get what most people consider normal is to be made to feel abnormal. And to feel abnormal is to feel like a second class citizen, which itself over time induces a sense that the entitlement to equal access does not exist. This produces a self-image of the disabled as second-class citizens in a ghetto which disabled persons are simply not prepared to tolerate any longer. They now insist upon their right to "normalization."[40]

At the same time, they know that their disabilities may require particular attention. In order for them to have the same kind of access to legal services as anyone else, may require that special measures be used to equalize the process. These measures may involve the utilization of mechanical devices such as TDD equipment, structural devices such as ramps, or human assistance in the form of interpreters.

In addition to these facilitative measures, what is certainly required is a degree of familiarity with the client's needs on the part of the legal professionals. Lawyers will have to learn about how best to communicate with a client who is prevented by physical or mental disability from doing so easily. They will have to understand both the lawyer's duty to accommodate the specific disability and the client's need to be represented in the same general way as any other client. And most importantly, the lawyer should be familiar with the social service, bureaucratic, institutional and administrative environment in which the client is seeking a remedy. Serving the disabled client means understanding the client as well as the milieu.[41]

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[40] Wolfensberger, A Multi-Component Advocacy/Protection Scheme (Toronto, 1977), and Wolfensberger, Normalization (New York, 1972).

The degree of training will of course depend on the nature of the legal services to be performed as well as on the disability of the particular client. For some clients who have a mobility disability and are seeking a remedy in a traditional area like criminal law, little more than sensitivity on the part of the criminal lawyer to a client's physical access difficulties may be called for. The criminal lawyer who acts for a client with a visual or auditory disability will, in addition to this sensitivity, need to know how to ascertain the extent to which the disability has interfered with the client's

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41. It will be necessary for handbooks and comprehensive books and articles to be prepared and published explaining this environment.

degree of comprehension. At the best of times it is difficult to explain to someone the complicated range of procedural and substantive options in a particular legal case. For a client who may have been deprived of learning opportunities because of his or her sensory disabilities, these complexities may be completely incomprehensible without careful explication.

The criminal lawyer who acts for a client with mental disabilities has an even more difficult role. It may even require the assistance of a behavioural scientist to determine the extent of disability. But at the very least it takes a practitioner who understands the client to provide the qualitatively acceptable degree of legal services to which the client is entitled.

These degrees of specialization involve training lawyers to communicate effectively with their clients. If other less traditional areas of law are involved, and the lawyer seeks effectively to represent the disabled client in dealing with that client's social service network, an additional layer of training is desirable. In most cases, this is a layer of knowledge which would be identical to the one required by the lawyer acting for a disadvantaged client who is not disabled. They may share in common a need to know the legislation, regulations and bureaucracies which define the government services and benefits area and which permeate the lives of disadvantaged people. And they share the need to understand how, where and why these strands intersect. It can be a dauntingly confusing play unless one knows the script and the players.

But even beyond knowing and understanding the basic infrastructures, the lawyer who acts for the mentally disabled client will need a unique set of qualifications. This lawyer will have to learn how and when to take instructions if the client is seriously disabled, how to determine the extent of the disability, how to deal professionally with the client's medical service providers, how and when to seek out or respond to the wishes of the client's family and how to reconcile the rights of all these interests as well as those of the public, if there is a perceived or actual conflict. Some of these issues will be addressed later in the Report, but for the purposes of this section, it is my intention only to indicate that the potentially overwhelmingly complex aspects of acting for a mentally disabled person make a special degree of training necessary for the lawyer who wishes properly to act for such a client.

How then to reconcile the need to integrate legal services for the disabled client with the need to ensure that this client will be effectively represented? I have already referred to the need for a designation among Legal Aid lawyers of who can and will act for disabled clients, and have referred as well to the need for clinics to have lawyers available who can so act. The same reasoning would apply to the profession generally. For the sake both of the client and the lawyer, and in the interests of protecting the personal integrity of the former and the professional integrity of the latter, there should be in Ontario a specialized bar[42] and a list which so designates the lawyers who are able and willing to act for disabled clients. The list should be organized based on geographic location as well as on speciality.

There should be a number of aspects to this list which would be widely available. Lawyers should be listed by area of legal specialty such as family, criminal, administrative, landlord/tenant law or the law of the handicapped. Also shown should be the following:

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[42] In recommending this, I do not wish to limit an individual client's freedom to choose a lawyer who does not possess these special qualifications.

1. whether the office and its facilities are physically accessible;
2. whether the lawyer has a TDD service;
3. whether the lawyer is willing to see clients in their residential or institutional setting;
4. whether the lawyer is skilled in dealing with the mentally disabled client.

The lawyer, to qualify for inclusion on the list will have to attended those educational courses or have had a degree of experience deemed appropriate by the Law Society. The training should be done in consultation with disabled consumer groups who are undoubtedly the best people with whom to consult on their own needs. For advice on representing these clients, no group is a better resource than ARCH, which represents only disabled clients. I would expect that the educational or experiential requirements should be more vigorous to qualify as a legal specialist in dealing with a client who is mentally disabled than one who is visually disabled, but there is no reason why these different areas should not be combined in any curricular content.

The same standards should apply for a specialist lawyer in the field who wishes to be on the Legal Aid panel. Eventually, such a list would form part of a master list of Ontario lawyers established and maintained by the Law Society or by the Office of Legal Services and Resources for the Disabled (described in the next chapter). The guidelines for qualification should be circulated to the profession whose individual members could then apply for inclusion on the list as and when they felt they qualified. In the event of a dispute over qualifications, a committee consisting of a representative of each of the Law Society, the Clinics, the Legal Aid Plan and the Canadian Bar Association (Ontario Branch) could determine the issue.

The list as compiled could then be generally available in Ontario as a reference book for the benefit of the public and the legal profession.

Not only would this have the advantage of identifying by appropriate subclassification where a disabled client should go in Ontario for legal services, it would encourage through its training and educational component the interweaving of the resources of the Clinics, Legal Aid and the private bar. Although these three aspects of the profession differ in how they deliver legal services, they share a consistent desire to deliver them as effectively as possible. In achieving this goal of maximizing the ability to serve the public as lawyers, much more in the way of shared training, education and even experience should be taking place.

Pro Bono Legal Services

It is inevitable that any discussion of the provision of legal services for the disabled include reference to what has come to be called '*pro bono*' legal services.[43] The inevitability derives from a number of sources - the entrenchment of this form of service in the United States; the diminution of public and private funds for legal services; the pre-Legal Aid tradition in Ontario for free legal services; and the magnetic pull of the *Charter of Rights and Freedom*,[44] with its possibilities of historic and influential litigation in this and other areas of law.

The essence of *pro bono* legal services is to provide free counsel to those who are unable otherwise to pay for legal services. As the pincers of economic recession tighten around more and more people, the potential clientele grows proportionately. Even with the existence of Legal Aid, there are many who are unable to afford lawyers. This is the case not only because of the inadequacy of a given person's income, but as well because of the enormous expense of today's legal system.

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[43] Herr, "The New Clients: Legal Services for Mentally Retarded Persons" (April, 1979) 31 *Stanford Law Review* (No. 4) 553. See also *Maryland Association for Retarded Children* v. *Maryland*, Equity No. *100/182/77676*, a case in which counsel from three large law firms worked with national Legal Aid and Defender Association lawyers to obtain a statewide right to education decree.

[44] *The Constitution Act 1982*, c. 11 (U.K.), Schedule B.

Because of these prohibitive costs, which resulted in unfulfilled legal needs, systems with varying degrees of formality developed in the United States to provide free legal services. Before 1966, many lawyers in Ontario represented clients who were poor without charging a fee. With the introduction in that year of Legal Aid, the need for free services was clearly reduced. Over the years, Ontario lawyers still occasionally represent without fee clients or causes to whom they are committed, but no structured form of pro bono service exists in this province or indeed anywhere in Canada.

It is beyond the mandate of this study to determine the degree to which such a system of free legal services should exist in Ontario. That pro bono services can be a positive contribution by.the legal profession is unquestionable. If these services are provided by competent counsel, if they include assistance by senior to more junior members of the bar, or if they assist in ensuring that the important cases get judicial airing, then pro bono services can be invaluable.

But they should not and cannot be the backbone of any legal service delivery model for the disabled client. This would place an unfair obligation on the shoulders of the legal profession. It would also make the handicapped client an unjustifiably singular object of charity. The handicapped client is, and should feel that he or she is, entitled to the same kind and quality of legal service as is everyone else. If, over and above that basic service, the legal profession is prepared to provide supplementary forms of pro bono service, for example, for significant test cases under the Charter of Rights and Freedom,[45] that achieves appropriate professional goals without jeopardizing those of personal dignity.

I do not propose to suggest ways in which a pro bono system can work in Ontario. This is a matter for the Law Society and the various interest groups to consider. Any system which is developed, however, should have a regular monitoring aspect to guarantee that there is some consistency in the quality and effectiveness of the legal representation. Any list of qualified lawyers who volunteer to provide these services should be available to all Legal Aid Directors and officers, all Legal Clinics, and to any lawyer in Ontario.

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[45] Ibid.

CHAPTER VII

DESIGNING AN APPROPRIATE STRUCTURE

There is no system or structure in Ontario which as it is presently constituted could easily lend itself to becoming the basis of a comprehensive legal services network for the disabled. That such a network is required seems to me to be an inescapable conclusion. I am aware that the economic climate militates against the establishment of new administrative entities, but having considered the options, I am persuaded of the need for this structure. Nor am I satisfied that its cost will prove to be significantly greater than the total cost of these indispensable services if they are offered on a piecemeal and more scattered basis. In recommending a new body to be referred to as the Office of Legal Services and Resources for the Disabled (OLSRD), I considered the following:

1. In recent years, as efforts to meet the needs of the disabled have increased, varieties of services have been created. On the whole, this has resulted in a patchwork of systems, institutions and bureaucracies. Eventually, many of these systems merged or consolidated

as a broader perspective developed. Others spawned still more projects or undertakings. The diffuse proliferation is an understandable outcome of learning to deal with the many complex needs of the handicapped community. It is also a reflection of the diversity of these needs. But in diverse and diffuse form, this proliferation can result in a great deal of confusion for the disabled individual and inefficiency for everyone concerned.

We have learned a lot over these past few years about how to create access for the disabled person to what is generally available to the public. When that experience is applied to the question of providing legal services, it is clear that one of the easiest ways of making sure that the access is available is to centralize it. Given the difficulties which confront any potential client in finding a lawyer or even learning whether the problem is a legal one, it is not hard to imagine that these difficulties increase exponentially when faced by a disabled client. Having a central number to call or place to go reduces these problem drastically. This is access at its most obvious level.

2. As has been pointed out, many disabled persons need special measures to get physical or communication access

to the legal system. Special telephones, interpreters, or physically accessible offices mav be required. At the moment, most associations for the disabled, some disabled individuals, and very few lawyers know where and how to arrange for these ancillary but vital methods of access. The problem increases in Ontario, moreover, the further one lives from the major urban centres. The new structure will therefore have the crucial advantage for all participants in the delivery of legal services for the disabled, of being able to arrange, or to advise how to arrange, for the provision of these measures.

3. Those disabled people who are permanently or temporarily living in institutions, hospitals, extended care facilities or in residential isolation, need directed and aggressive outreach services. Many of these people are unable to initiate contact yet desperately need the service. Their right to access can only be guaranteed if there is a structure responsible for seeking them out and assisting them.

4. The effective delivery of legal services in the contexts described in this Report require monitoring, educational, training, and enforcement aspects. The services should also be consistent, constant, and predictably available both as to quality and quantity.

What I therefore envisage is a new body, an office which would administer and arrange for the provision of those services which will guarantee effective access to legal services by the disabled individual. It should be a body created by statute in order to better protect its existence from either shrinking budgets or political interest. It should report to a cabinet minister, likely the Attorney-General, through whom annual reports will be presented to the Legislature. Funding should be from a number of involved ministries, including Health, Community and Social Services and the Attorney-General. Because of the nature of the service, additional funding should ideally be available from some federal departments.

To preserve its independence in fact and in appearance, the office should be accountable to a Board of Directors consisting largely of individuals who are themselves disabled or are representatives of organizations for the disabled. The ARCH board of directors as it is presently constituted, offers an ideal model of such a representative board. In addition, there should be lawyers, advocates, and behavioural scientists. The groups themselves should be asked to nominate the majority of the members and the government should have the right to nominate the remaining directors who should have some interest or involvement in the field. This board, consisting as it does primarily of representatives of the consumers the office is meant to serve, would be able to give the kind of policy and practical advice that an affected and experienced individual can best give. There is no reason to assume that because the money comes from government, the office will not be independent. It will be the board which governs the office, not a ministry.

Overseeing the workings of the office would be an Executive Director who would report to the Board. Reporting directly to him or her would be 2 persons: one responsible for the needs of the physically disabled, and one for those of the mentally disabled. The kinds of services which would be administered would be:

Legal Advocates

Properly trained, legal advocates[46] can be an indispensable part of the delivery system of legal services to the disabled. In their ability to provide a link between the client and the lawyer, and in their ability to decipher when such a link is necessary, lies their greatest strength.

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[46] By legal advocates, I mean trained non-lawyers who would have free access to direction and advice from a lawyer.

Their use in a law office is obvious. They can conduct interviews, assist with research or the preparation of documents, and negotiate with government agencies or other parties involved in the processing of a legal matter. Their use outside such an office, though less obvious, can be critical. Many of the disabled are institutionalized, hospitalized, or otherwise immobile. For them, legal services exist in the abstract but are unattainable in reality. Nor would every such person require the services of a lawyer. But he or she should at least have access to someone who could advise as to whether or not a given situation called for the services of a lawyer.

What is urgently needed is a comprehensive scheme whereby legal advocates are regular and accessible visitors to individuals in extended care facilities, hospitals, institutions, nursing homes, homes for the elderly residents, or even private homes - in short, every place where a disabled person lives either voluntarily or involuntarily, in an environment in which access to the outside community is either curtailed or non-existent.

To some extent, this service must be interventionist. Although no system should be devised which is mandatorily intrusive, it must be devised in such a way that the initial contact is aggressively pursued. If after a first encounter and discussion the person wishes no further contact with the advocate, the advocate should do no more than leave his or her name and how contact can be made in the future. In this way, there is no invasion of a patient or resident's privacy beyond the first visit when the existence of the service is explained.

Advocates should not have their permanent offices on the premises of the institution in which they are providing the service. But they should have free and uninterrupted access to the facility, to a private room where residents/patients can be interviewed, and to the hospital, institution or facility's records with the consent of the resident. This right of access by the advocate or lawyer should be protected by statute or regulation to prevent the possibility that a hostile facility will try to keep the advocate or lawyer off the premises.[47] The threat of being charged by the institution with trespassing should not have to be a worry for legal advocates or lawyers.

At the same time, legislation should also provide that communications or disclosures between advocate and resident/patient are privileged, as is the information the advocate learns from the records. Since the advocate is really in these situations standing in the shoes of the lawyer, both he or she and the patient should enjoy the same protections as would exist between a solicitor and a client.

The advantages of not having a permanent on-site office are:

a) The appearance of independence and impartiality *vis-à-vis* the facility and the advocate is preserved.

b) The possibility of "burn-out" for the advocate is reduced.

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[47] See generally, Himelfarb and Lazar, *Legal Aid for Mental Patients - An Evaluation Report* (Ottawa, Ontario, April, 1981).

c) A more arms-length relationship with the facility will exist, avoiding the prospect that either the facility or the advocate will view the advocate as a staff-member of the facility.[48]

Some of the work of the advocate may involve investigating allegations against the facility itself. This can only be effectively done if all parties - the patient, the facility, and the advocate understand that the advocate is not an employee of the facility. There may be strained relations between the advocate and the facility from time to time - an understandable possibility in the circumstances - but over time and as the systems begin to understand each other, the relationship should improve at least to one of mutual professional respect.

Upon admission to a facility, the administration should notify the Office of Legal Services and Resources for the Disabled, which will then contact a regional representative to send an advocate to speak to the patient. The family should also be notified upon the

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48. Ibid.

admission of a relative of the existence of this office. In facilities like hospitals where admissions are consistent and generally short-term, there need be no more than the hospital advising the patient of the existence of the service and of the hours when the advocate is available. These patients usually have less difficulty getting access to lawyers and are not a priority. The main need is to put the advocate in contact with patients receiving chronic care, and with patients in psychiatric hospitals or units.

During the first meeting, the advocate should advise the resident or patient of the existence of the service, the rights generally of a patient, and, where relevant, the specific rights of a patient in a psychiatric facility. If the patient wishes to pursue these rights either as a result of that first interview or at some subsequent point during his or her confinement, the advocate should enlist through the regional office the services of a lawyer to take appropriate legal action or give legal advice.

The advocate is a link who can screen patients' needs and provide a lawyer for those needs which are legal.

The advocate could be retained by the OLSRD on a contract basis much in the same way that the services of APSW's are arranged. In each part of the Province, there should be lists of appropriate persons, with a concentration in those areas where there are hospitals, extended care facilities, psychiatric institutions or homes for the elderly. The advocates should be extensively and continuously trained not only to be able to identify legal problems, but to be able to communicate with disabled clients as well. They should be regularly monitored for effectiveness and sensitively assisted to guard against exhaustion. They are the most important assistants lawyers can have in providing legal services to disabled people who are confined, isolated or otherwise unreachable.

Legal Referral Service

The list of specialized lawyers referred to earlier in this Report could be maintained at this office. A staff member from the OLSRD could easily be responsible for chairing the committee which prepares and updates the list.

The *pro bono* system ultimately established by the Law Society would also have a connection with this

Office, but the coordination of this system should be the responsibility of the Law Society rather than of the OLSRD.

Referrals could be arranged with Legal Aid lawyers or with members of the private bar, as could initial interviews with lawyers. A special arrangement should be made with Legal Aid to permit a system of lawyer selection which would obviate the necessity of attending at the local Legal Aid office if this is too great a hardship or if the local Legal Aid office is inaccessible either physically or in its communications systems.

In addition, there should be at least two OLSRD staff lawyers, one of whom could be designated by Legal Aid as an intake officer for purposes of processing applications for certificates. These lawyers would be available to provide information by phone to disabled clients who wish advice on the legal aspects of their problems. In cases where a referral is required, these lawyers could then arrange an interview for the client with an appropriate lawyer.

Their main purpose however would not be to give legal advice. It would be to act as advisors and resource persons to the legal advocates and to coordinate their work.

Interview Facilities

The OLSRD must be physically accessible in every respect. The entrance and every part of the premises which the disabled client might need to use should be easily accessible. Moreover, the facilities of the office should be available to look after the requirements of any disabled person. This means there should be a complete range of communication devices, including TDD's, cassettes, or braille forms, which the disabled client might need.

These interview facilities should be available for use, by appointment, by any lawyer who wishes to represent a disabled client but whose office is inaccessible. This might not be an extensively required service, but should be there for occasional use by the profession. It may be, for example, that a client who has for years used the same lawyer, suddenly through illness becomes physically disabled as to mobility. In these circumstances, if the lawyer is unable for some reason to go to the client's home but wishes to continue to represent the client, arrangements could be made for interviews to take place on the premises of the OLSRD.

Interpreter Referral Service

There are many forms of communications disabilities. These disabilities create impediments in the individual's ability to receive or give information which require varying degrees of remedial measures. For such a person, access to legal services is impossible without an interpreter.

Section 14 of the new Canadian Charter of Rights and Freedoms[49] refers to a person's right to an interpreter. This may eventually be interpreted to mean that it is the responsibility of the State to provide the interpreter at no cost to the individual, as a service provided as part of the administration of justice. For the disabled client, this is an absolutely necessary service. I have no hesitation in recommending that interpreters be provided at no expense to clients who have communications disabilities much as I would have no hesitation in recommending that ramps be provided at no expense to clients who have mobility disabilities. The indispensable tools should be freely available. If a government funded interpreter service is an economic impossibility, priority should be given on the basis of the financial needs of the client. Any disabled client of a Clinic or Legal Aid or of a pro bono system should be presumed to be in this priority category and entitled to an interpreter at no cost.

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[49] The Constitution Act 1982, c. 11 (U.K.), Schedule B, s. 14.

The OLSRD should provide a referral service for the various kinds of interpreters required to assist clients with communications disabilities. In developing the interpreter service, the following matters should be considered:

a) A Training Institute should be established in this province to train interpreters properly not only in basic skills for interpreting but also to provide the skills required to interpret in legal situations. There is a need for this specialized ability so that the terminologies traditionally used by the legal profession are understood by the interpreters.50

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50. Supra note 23, chapter 9.

This institute would have a Certificate-granting authority which would indicate an adequate degree of proficiency on the part of the interpreter. Ideally, only qualified interpreters should be used by lawyers, legal advocates or the courts. It is unfair to clients in communicating with a legal representative or in a courtroom, to be dependent on a person inadequate to the task of interpreting to and for them.

Many interpreters already exist in Ontario and have regularly and generously interpreted for disabled persons. Only a handful are technically qualified as legal translators. These volunteers with years of experience should be entitled to attempt the examination for certification without having to attend the full legal interpreters' course. Given the absence of certified interpreters and of an institute in Ontario, these people will continue to be relied upon. Ideally, however, there should be a network of specially trained and qualified interpreters who are paid professionals.

b) The interpreters should be retained on a contract basis much as the legal advocate will be. They should be and feel that they are independent of government.

c) The interpreter should be contacted as soon as the first interview with a lawyer or legal advocate has been arranged. Legal Aid and the Clinics should ensure the provision of a interpreter when setting up interviews. Police departments should also call the OLSRD before attempting to communicate with an accused who has a communication disability. For this reason, an emergency 24 hour interpreter referral service should be available.

The interpreter should be present during every interview with the lawyer, advocate or police and at all times during negotiations or court proceedings at which the client is present.

d) Upgrading courses for interpreters should be available through the Training Institute. It is extremely important that objectively acceptable standards of interpreting are not only introduced, but maintained.

e) Guidelines should be developed on what constitutes proper professional execution of an interpreter's duties.[51] Such a code of ethics should make it clear for example, that an interpreter should not interpret for more than one party in a transaction or proceeding. Moreover, the test of a qualified interpreter's effectiveness should be whether the client himself or herself is satisfied that the views are being properly communicated. Two interpreters should be available for lengthy testimony in order to provide a quality check on the interpretation and to provide periodic relief.

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[51] Gardner, The Legal Implications of Professional Sign Language Interpreting (National Center for Law and the Deaf, Washington, D.C., 1982).

f) Communications between an interpreter and a client should be privileged when conducted in a solicitor-client context.[52] The interpreter should be

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52. Several American states have laws recognizing the privileged nature of client-interpreter communications. See, for example:
Kentuck Rev. Stat. §304.064 (Supp. 1976): New Hampshire H.B. 870. Ch. 521.1-521.5 (1977): Tennessee Code Ann. §24-108: and Virginia Code Ann. §2.1-560 through 2.1-563. §19.2-164. §8.01-400.1, and §63.1-85.4
Also, see *Touhey* v. *Duckett*, 19 Crim. L. Rptr. 2483 (Cir. Ct. Anne Arundel County, Md., 1976) summarized in Dubow, *Supra*. note 23, at p. 127:

> "A Maryland circuit court ruled that interpreters could not be ordered to disclose statements that a deaf suspect made to his attorney. An interpreter with legal-specialist certification was subpoenaed to testify before a grand jury about a jailhouse interview between a deaf defendant, his attorney, and the defendant's relatives. The judge stated: 'When both attorney and client depend on the use of an interpreter for communicating to one another, the interpreter serves as a vital linking in the bond of the attorney-client relationship.' The judge also stated that the presence of close relatives at such interviews may be helpful in aiding the accuracy of the communication, thereby 'enabling the attorney to provide meaningful assistance to his client.'

be protected from being compelled to give evidence as to what was said by the client in the interpretation of communications between the client and the lawyer or as part of legal proceedings.[53]

The advantage of a core of interpreters throughout Ontario is undeniable. To date, much of this kind of interpreting has been done by family and friends. However well-meaning these people may be in interpreting for their disabled relatives or friends, they violate by their closeness the client's right to privacy in discussions with lawyers. There may be the problem too that the interpreting relative will consciously or unconsciously transmit his own emphasis rather than those of the client. The client's right is to objective, qualified, and independent interpreters who can be relied upon to protect the privacy and integrity of the solicitor-client relationship.

Legal Information, Research and Education

It is the ultimate goal of ARCH that legal services for the handicapped will become so thoroughly integrated with the mainstream of the profession, that ARCH's only eventual role will be as the major legal research and information centre for the handicapped in Ontario. Until that happens, there is an urgent need to provide this education and research service. A branch of the OLSRD could ideally fulfil this function in conjunction with ARCH until ARCH is ready to take over the area.

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[53] *Supra*. Note 51.

In its educative capacity, in addition to collecting and distributing information, the OLSRD could be extremely useful in the training of the various professionals, including lawyers, legal advocates, and interpreters, who are involved in delivering legal services to the disabled.

It is impossible to discuss the delivery of legal services without discussing the primary responsibility to instruct members of the public about the laws that affect them, and their legal rights. This means for most people, the wide distribution of information about the law in language which is understandable.

Information about the law, government services, lawyers, legal systems, and legal services must be widely disseminated to members of the disabled community. The materials should be prepared in each case in consultation with the disabled themselves to be sure that the material as prepared is understandable to that particular group. Since these services are being designed for their benefit, they should be designed with their advice. The material should also be aimed at family members, who often constitute a disabled person's first resource in coping with his or her disability.

Organizations like the Canadian Law Information Council (CLIC), Canadian Legal Education for Ontario (CLEO) and the Canadian Legal Advocacy, Information and Research of the Disabled (CLAIR) could also be enlisted because of their extensive and unique expertise to assist in the preparation and distribution of the material.

The educational process has a number of stages. First, people must know that they have a problem. Second, they have to know that the problem is legal in nature. Third, they have to know whether more information is required about the problem. Fourth, they should know where that information can be obtained.

Generally, methods of informing disabled people of the law could include closed-captioned television programmes, enhanced central government phone number services with TDD components, or information circulars distributed with government cheques or information. Cable television companies could emulate a Saskatoon legal phone-in program where TDD's and captioning were used to produce a television programme on the legal needs of the deaf. Consumer groups could also be relied upon to share the information among members.

The Ministry of the Attorney General should have a TDD accessible inquiry number. Pamphlets about the law, as well as major statutes should be produced on cassettes[54] and in large print formats. Government has an obligation to take the lead in the provision of legal information.

The importance of this information being available to all disabled persons cannot be over-estimated. It is not a luxury to know what the law is and what one's rights are. It is necessary to full and effective participation in the community. People have a right to know what is expected of them and what they can expect from others. Without this information, there is only partial integration, an intolerable condition for any member of the public who is willing to be a full participant.

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[54] The Ontario Human Rights Code and the federal "Obstacles" report are both available on cassette.

Mental Capacity Assessments and Representing a Mentally Disabled Client

There should be a presumption of capacity to instruct counsel on the part of everyone in Ontario. The fact that a person has been found incapable or incompetent for other purposes, such as the ability to manage financial affairs, need not mean that the person is unable to advise counsel. The essence of instructing counsel lies in the client's ability to understand the nature of instructions given and the implications of the advice received. The fact that a person is a patient, whether voluntary or involuntary, in a hospital or institution should not in itself deprive that individual of the right to have a lawyer follow his or her wishes. Nor should lawyers be, or face the prospect of being, penalized in costs if they in good faith thought their clients were able adequately to give and receive instructions.

At the same time, it would be irresponsible to suggest that a lawyer follow instructions in every case if he or she feels that the client does not understand the transaction or proceeding. An independent system should therefore be set up through the OLSRD whereby a lawyer who feels that a client lacks capacity to instruct can have that client assessed. The OLSRD would have an approved list of qualified behavioural scientists who would be available to advise the lawyer as to the client's capacity. Those assessors who are not paid by OHIP would be compensated out of the OLSRD budget.

The advantages of this system are its objectivity and independence, its attempt to avoid depriving people of their right to effective representation when they may appear to require guardianship rather than a direct relationship with a lawyer, and the fact that it does not force lawyers to make behavioural judgments they are untrained to make.

Its disadvantages are its intrusiveness and perceived invasion of a clients privacy, its potential expense, and its reliance on what could be the arbitrary judgements of behavioural scientists.

On balance, however, the intrusiveness is outweighed by the prospect of an effective relationship with a lawyer, the expense by the potential expense of unnecessary guardianships, and the arbitrariness of scientists by the possibility of at least equal arbitrariness on the part of lawyers.

Where the assessment indicates an inability to instruct counsel, a guardian should be appointed through the OLSRD for the limited purpose of the proposed legal transaction or procedure. Where the assessment confirms the presumption of capacity, the lawyer should follow and advocate the clients wishes as he or she would for any other client.

There should be certain fundamentally important circumstances under which the presumption of capacity should exist in any event. These are cases when the liberty of the individual is at stake. In each of these cases, lawyers should be automatically provided through the OLSRD if the client cannot otherwise find counsel. These circumstances include:

a) In any proceedings for release from confinement, such as those before the Advisory or Regional Review Boards, or habeus corpus proceedings.

b) In any proceedings to determine the person's competency, under the Mental Incompetency Act.[55]

c) "Fitness to stand trial" hearings in criminal proceedings.

These functions should be carried out by independent lawyers selected through the OLSRD from the List of The Specialized Bar rather than through the Public Trustee or the Official Guardian's office, the two agencies traditionally associated with representing the interests of the mentally disabled.

Where a patient is found to be mentally incompetent in a psychiatric hospital, the Public Trustee is automatically brought in and a presumption of incompetency attaches for all purposes.

I heard much from the various groups about the role of the Public Trustee. They strenously objected to the automatic involvement of the Public Trustee. They felt that this deprived the patient of his or her right to private and independent legal representation. Moreover, because the Public Trustee acts without benefit of a guardian or next-friend, those members of the family who up until the point of admission may have been most closely involved with the patient are brought into the decision-making process only at the discretion of the Public Trustee.

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[55] R.S.O. 1980, c. 264.

I am sympathetic to the suggestion that there should not be an automatic call on the services of the Public Trustee where a finding of incompetency has been made in a psychiatric hospital. But there is also no doubt in my mind that on admission, legal services should be made available whether or not a finding of incompetency has been made, optimally through the OLSRD. The various rights should be made known to the patient on or as soon after admission as possible. The information, or the fact of its availability, should be made known as soon as possible so that the client will be able to consider issues such as consenting to treatment or proceedings to review involuntary commitment, before they become unalterable. Legal services should be brought in through the OLSRD's legal advocacy network.

If the patient is in a public hospital, then in Ontario at present the Public Trustee is not automatically brought in. Rather, an application can be made by a member of the family under the Mental Incompetency Act[56] to represent the patient as a guardian. This only applies if the patient is admitted to the psychiatric wing of a public hospital, and appears to have no application at all if the patient is in any other institution which is not specifically designated as providing psychiatric services.

There is thus a proliferation of alternatives each of which is uncertain and in need of clarification. These are regulated by diffuse and inconsistent statute laws which result in unjustifiably different consequences depending on where or whether the mentally disabled person is hospitalized.

There is nothing about these inconsistencies which can be logically supported. There is no reason why the Public Trustee should be involved in one kind of situation and not the other, and why some families should be able to represent and participate in the legal care of the mentally disabled patient while others cannot. Although this report is not mandated to look into the question of substantive law, I think it is important to understand that the process cannot operate smoothly without some clear statutory base. All legislation dealing with the mentally disabled should be synthesized and clarified so that the rights flow from the fact of the disability, and not from the geographic or institutional location of the disabled patient. I believe it would be useful to have an independent review of the mandate of the Public Trustee with a view to rationalizing and modernizing his role.[57]

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[56] Ibid.

It is also unclear what role the Official Guardian is expected to play in representing the mentally disabled.[58] The Official Guardian expressed to me a willingness to act for persons in court cases who were disabled, and the Public Trustee as well expressed an interest in expanding his role in order to act as guardian of the person. At present, the Public Trustee acts principally as financial manager for a patient found to be mentally incompetent, whereas the Official Guardian deals, if at all, with those cases where other

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57. I also believe it would be useful for the Ontario Government's Interministerial Committee on Guardianship to resume its deliberations.
58. This is not resolved in the new Courts of Justice Act, nor in the late Walter B. Williston's report on the Rules of Practice.

rights of the disabled are involved. But it is very clear that much confusion exists as to roles and responsibilities and, again, this should be resolved, ideally through the replacement of these services by the coordinating efforts of the newly created OLSRD. The right to counsel should be automatic for anyone who is by virtue of physical or mental disability hospitalized or institutionalized and cannot otherwise easily get a lawyer.. If necessary, recovery of costs can be made after hospitalization has ceased, on a statutory formula, but these are questions which should not get in the way of the client's access to a lawyer while he or she is in a position of being unable independently to seek the benefit of counsel.

The purpose of the whole system when a mentally disabled client receives or is about to receive medical treatment or hospitalization, should be to maintain the balance which exists between the client's right to be treated, the medical profession's duty to treat, the public's right to be protected and the patient's right to an independent voice and to be integrated into the community. No doubt with the Canadian Charter of Rights and Freedoms,[59] and the development of a jurisprudence of rights, this balance will be questioned, tested, stretched, defined, and judicially analyzed. But it is very important that each of the professions involved in providing services to the mentally disabled understand the role the other must play.

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[59] The Constitution Act 1982, c. 11 (U.K.), Schedule B.

The procedures used before Hospital Review Boards and before the Advisory Review Board, in which these boards claim that confidentiality of records is necessary to protect the integrity of the system, of medical treatment and of the safety of the patient, interfere substantially and critically with the lawyer's right effectively to represent a client. Without knowing what case has to be met, it is hollow to represent to the patient that he or she is getting a fair and open hearing. Due process in its fullest vigour should be rigorously applied, and the Statutory Powers Procedure Act[60] made applicable.

In the Report of the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario,[61]

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[60] R.S.O. 1980, c. 484. Vance Egglestone v. The Advisory Review Board. (Unreported). Ontario Divisional Court. Released June 24, 1983.

[61] Report of the Royal Commission into the Confidentiality of Health Records in Ontario (The Krever Report) (Toronto, Ontario, 1980), pp. 30-33.

Mr. Justice Krever recommended that the Mental Health Act be amended to express the rule that, for the purpose of a hearing before the Advisory Review Board, the patient or his or her counsel has a right to inspect the patient's clinical record. Where the administrator of the psychiatric facility feels that the patient's treatment or health, or the health or safety of another, would be adversely affected by access to the clinical record, that issue should be decided by the Chairman of the Advisory Review Board, whose decision would be subject to review by the Divisional Court.

The Krever Report also recommended that legislation be enacted to express the rule that an individual has the right to obtain copies of any health information of which he or she is the subject. It was suggested that a Health Commission be appointed to receive and decide on application from healthcare providers for exemptions from this requirement, and from individuals seeking to have his or her health information corrected. In addition, legislation permitting disclosure of all health information pursuant to a patient's authorization should be enacted, and authorization should follow a prescribed form.

I fully endorse all of the above recommendations from the Krever Report, and recommend that they be adopted by the Ministry of Health on a priority basis.

It will be necessary to educate the medical profession as well as members of the public that these rights are valuable and no less worthy of protection than are those of an accused in a criminal trial. We have long felt as a society that liberty is a supreme good, to be protected before all else, and this is certainly no less true for an individual who finds himself or herself hospitalized or institutionalized, than for an individual who faces the prospect of incarceration.

These are two professions which have separate missions, some of which are incongruous to each other, and some of which are easily reconciled. But unless there is some understanding of the respective importance in roles that each must play, each can potentially interfere with the right of the patient/client to have full access to the other.

Monitoring and Enforcement

There should be some effective way established of monitoring the effectiveness of the legal representation to ensure that the services are not provided inadequately. In earlier projects in the United States and in British Columbia, there have been serious problems with staff morale and "burn-out".[62] These should be anticipated and prevented before they set in. This is a highly demanding form of legal representation, and care should be taken that the effectiveness of all aspects of the representation is maintained at a consistently high level of expertise, availability, and quality.

Reform

Because it will be an on-going institution with a broad range of responsibilities, the OLSRD will be in an excellent position to learn of problems in the delivery of legal and related services to the disabled. These problems and deficiencies, once identified and confirmed, should be communicated to the appropriate Ministry for remedial action. It may involve information on inadequacies in the accessibility of some courthouses, abuses in a health care facility, or inconsistencies in legislation. I see this as an ancillary rather than a major function of the OLSRD, particularly since there already exist a number of advisory groups to government in this area. On the other hand, the OLSRD should have the right, where these matters come to its attention, to pursue them in the same way as would any other knowledgeable group.

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[62] *Supra*. note 47.

Location

Access to the OLSRD should not be determined on the basis of financial need. It should be considered a service to all members of the public who are themselves disabled or who provide legal and related services to them. This includes lawyers, police, government personnel, institutions, detention centres, hospitals or family members. It is essentially a coordinating agency whose responsibility it is to ensure for disabled clients equality of access to equally effective legal representation all across Ontario.

To do this for regions outside Toronto will require the ability to make referrals to available qualified personnel in these various areas. Arrangements will have to be made for the use of accessible office space throughout the province, but this could be done on a shared basis with other offices or agencies. It should not be necessary to have full-time staff anywhere but in Toronto. Calls from around the province should be made either via local Legal Aid offices or directly to the OLSRD on WATTS (toll-free) telephone lines.

Conclusion

The advantage of a structure such as the OLSRD is that it will help to ensure that disabled people will have access to the same quality of legal services as is generally available to others in Ontario. As a coordinating body, the OLSRD will facilitate this process by helping to arrange the contacts, by providing whatever additional personnel or technical assistance is necessary to make the legal representation effective, and by monitoring both the demand for and supply of services.

And by relying primarily on the services of lawyers in each community, either through Legal Aid or privately retained lawyers, the segregation of legal services is avoided. Lawyers across the province will be encouraged to develop the skill and information required to represent disabled clients so that legal services for the disabled will be integrated. In this way, the OLSRD can help make the right of equal access to effective legal services a reality.

CHAPTER VIII

MISCELLANEOUS ISSUES

Throughout this report, I have made recommendations concerning changes which could be made in the administration of public legal services in Ontario, the role of the legal profession and the Law Society, and recommendations for changes in the way in which lawyers are trained. However, during the course of the consultation process, a number of other subjects were discussed in relation to access to legal services by the disabled. To a great extent, these represent separate and discrete topics.

Public Interest Litigation

As I have mentioned at various points in this Report, I believe that the new *Canadian Charter of Rights and Freedoms*[63] has potentially a very significant role to play in advancing the rights of the handicapped and disabled in Canada. Our courts will be called upon, over the coming years, to determine the validity of competing claims to equality and independence, and to weigh them against what limits prescribed by law are reasonably and demonstrably justified in a free and democratic society. The litigation experience in the United States involving the rights of the handicapped has been most revealing. It was only when substantive rights were coupled with effective legal procedures that significant progress was made in the courts. In particular, the rights guaranteed by Section 504 of Title 5 of the Rehabilitation Act of 1973, which has been the cornerstone of attempts to use the court system to advance the interests of the handicapped, have been most effectively mobilized through class action procedures.[64] Class actions are court cases where a large number of people are equally affected by a particular problem or situation, and band together for the purpose of bringing a legal claim. The case is actually brought by a class representative on behalf of a group of persons with common interests. However, the litigation is conducted on behalf of all persons affected. A successful outcome for one will thus be shared by all.

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[63] *The Constitution Act 1982*, c. 11 (U.K.), Schedule B.

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[64] *Supra*. note 26.

In Canada, with the exception of Quebec,[65] there are not effective class action remedies. The Ontario Law Reform Commission[66] has recently recommended that Ontario should have effective class action statutes, incorporating sufficient safeguards to ensure that there are no unrealistic burdens on the court systems, in the legal profession, or on the parties. I have no wish to comment on the specifics of the Law Reform Commission's recommendations, but would simply point out that the reform of class action procedures will be vitally important to the handicapped, particularly insofar as litigation under the Charter of Rights and Freedoms is concerned. In addition, Legal Aid will be called upon to make more generous allowances for Groups Certificates under the Legal Aid Act, so that class actions and groups actions can be launched.[67]

Abuse of Institutionalized Persons

We have no way of knowing the extent to which abuse of residents in health care institutions such as extended care facilities, nursing homes, psychiatric or

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65. Loi sur le recours collectif, S.Q. 1978 c. 8.
66. Supra. note 29.
67. Supra. note 33, Pt. I, pp. 95-101.

regular hospitals or homes for elderly residents occurs. However, many of those who met with me in my consultation meetings expressed serious concern about these situations.[68] The issue is not how often abuse occurs but how best to protect those disabled persons from even a single incident. Abuse, regardless of how infrequently it occurs, is a sufficiently important issue that government should consider imposing upon the staff of such institutions a mandatory duty to report abuse to the relevant authorities, coupled with a protection against recrimination or disciplinary measures for those who make such reports. In addition, it should be provided by statute that the institutions mentioned above permit entry onto the premises by any advocate, lawyer or family member wishing access to a patient.

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[68] Also see: Legislature of Ontario Debates. Official Report (Hansard). 2nd Session, Thirty-Second Parliament. Standing Committee on Social Development. November 30, 1982; December 1, 1982; December 2, 1982; January 24, 1983. (Toronto, Ontario).

Tax Deductions

a) Structural Renovations

While structural alterations to commercial buildings made in order to remove architectural barriers are tax deductible as business expenses, such alterations, when made by a private individual, are classified as medical expenses and offset against three percent of that individual's gross income. Since these alterations are directly related to an individual's disability, and since access to services begin with the removal of architectural barriers, they should be encouraged by allowing as deductions all expenses incurred altering buildings so as to make them accessible.

b) Mechanical Aids

Access to information is an important aspect of access to the law. A disabled individual will incur greater costs in gaining access to information because of his or her need to rely on special technologies such as braille, large print, cassettes or other means of electronic communication. The Income Tax Act[69] should assist the disabled in bearing the burden of these extra costs. A disabled individual should be able to deduct the full cost of goods and services directly attributable to his or her disability.

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[69] R.S.C. 1970, c. I-5. (as amended).

Educating Lawyers and Law Students

The Law Society, Bar Admission Course and Continuing Legal Education should place a greater emphasis on the law of the disadvantaged in general, and on the rights and needs of the disabled in particular. Wherever possible, the handicapped themselves should be involved in the structuring and conducting of programs aimed at sensitizing the legal profession, including the judiciary,[70] to the issues and problems faced by that segment of the population.

Discussion of the problems relating to an individual's capacity to instruct counsel should be included in the Law Society's Professional Conduct Handbook. Furthermore, Commentary 4 to Rule 14 of the

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[70] A model program in this respect has been mounted by the training institute for judges in California with the assistance of the Disability Rights Education and Defence Fund, Inc.

Code of Professional Conduct should list handicap or disability as a proscribed head of discrimination.

Law school administrators and those conducting the Bar Admission Course should seek to ensure that they are equipped to deal with the unique problems and needs of their students and prospective students who are disabled. This includes ensuring that the building is physically accessible and that course materials and examinations are available in an accessible format.

TDD (Telecommunication Device for the Deaf)

The Ministry of the Attorney General serves as a major provider of legal information, not only through its publications, but through its responses to inquiries from individual members of the public. In order that the hearing and speaking impaired can have equal access to the Ministry of the Attorney General, a TDD should be installed in the Ministry's main office.

The installation of TDD's in major police headquarters would enable those with hearing and speaking impairments to communicate with law enforcement agencies. In addition, the public at large benefits from the ability of all segments of the population to contact the police by telephone. The Metropolitan Toronto Police Force is, for example, currently accessible by TDD.

Client's Capacity and Costs

At present, a lawyer in a court proceeding is liable for costs if his or her client is found not to have the capacity to give instructions. This serves as a disincentive, and may operate to the detriment of an individual who is in need of representation. A lawyer who acted *bona fide* and in the reasonable belief that the client had the capacity to give instructions should not be penalized by being held personally liable for costs if it is found that this belief was incorrect.

Mental Incompetency

The provisions of the *Mental Incompetency Act*[71] need to be revised and reformed in light of current knowledge of the causes and incidents of mental disability, and current interpretations of due process. Sections 7 & 8 of the *Mental Incompetency Act* in particular need to be re-examined to define more clearly the rights of the alleged mentally incompetent person, including rights to due process and right to counsel, the scope of the trial and the extent to which the court is permitted or required to consider expert testimony, and the role of the Public Trustee in the entire process. As part of the general review of the mandate of the Public Trustee which I earlier recommended, there should also be an examination of the Mental Incompetency Act, taking into account the jurisprudence that has developed in interpreting the Act over the years, developments in other jurisdictions such as Alberta,[72] and the need to expand committeeship beyond purely estate matters and deal with the non-monetary needs of the mental incompetent.

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[71] R.S.O. 1980, c. 264.

Funding

I am keenly aware that many of the recommendations contained in this report will require additional funding. However, I believe that the needs of the handicapped and disabled cannot be overlooked in a society which has a formal commitment to equality before the law and to the equal protection of the law. In the setting of government budgets and priorities, the need to set aside special funds, both capital and continuing, should be recognized.

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[72] Dependent Adults Act, R.S.A. 1980, c. D-32.

While I do not wish to make detailed recommendations concerning the obtaining of resources necessary to implement the recommendations in this report, I would make two suggestions. Firstly, that the Provincial jurisdictional responsibility for the administration of justice should not make us overlook the fact that many of the areas of the law most directly affecting the handicapped fall under Federal jurisdiction. I believe, therefore, that discussions should be inaugurated with the Government of Canada to have appropriate cost-sharing mechanisms in place, either under the Canada Assistance Plan or through one of the other assistance programs for providing services to the handicapped, to ensure that an appropriate level of funding is available to promote equal access to legal services for the handicapped.

Secondly, I believe that the Provincial Government should explore the possibility of using the accumulated surplus of funds held by the Public Trustee to fund services that would provide legal assistance to the handicapped and disabled. It is analogous to the "cy-près" principle of the law of trusts that funds built up from the profits of the estates of the disabled should be used to further the interests of the disabled as a class. Authority for the allocation of these funds exists under Section 9(5) of the Public Trustee Act.[73] The government might also consider amending Section 9(5) to provide specifically that the accumulated surplus be used for special programs for the disabled rather than reverting to the consolidated revenue fund.

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73. R.S.O. 1980, c. 422.

SUMMARY OF RECOMMENDATIONS

1. The principle of a right to equal access to legal services for the handicapped and disabled should guide and inform all future developments of legislation or programs for their benefit.

2. Because access to legal services is critically important to the goals of equality, independence and normalization sought by the handicapped, there should be a major effort on the part of Government, society, and the legal profession to provide an effective level of legal services.

3. Law schools should develop special courses dealing with the legal needs of the handicapped and disabled.

4. Law schools should integrate problems and situations involving the legal needs of the handicapped into other courses, such as Constitutional Law, Criminal Law or Family Law.

5. The Bar Admission Course should contain mandatory instruction on those aspects of the solicitor-client relationship with which a lawyer acting for a disabled client will have to be familiar.

6. Continuing Legal Education courses should offer instruction on acting for clients who have mental or physical disabilities.

7. To make court facilities more accessible to those with mobility handicaps, those responsible for the architecture and design for court facilities should consult the handicapped, to develop satisfactory access standards.

8. Additional study ought to take place into the coordination and interconnection of the Legal Aid and Community Clinic system for delivering legal services.

9. There should be more exploration of alternative ways to have the legal profession contribute to the financing of Legal Aid, other than the 25% mandatory contribution of those working on Legal Aid Certificates. Responsibility for this contribution ought to be more equitably distributed across the

profession, and not fall solely on the shoulders of those who take Legal Aid cases.

10. There should be further exploration of additional ways of raising funds for public legal services, to ensure that consistently effective legal services will be available to every member of the public who requires them.

11. The Legal Aid Financial Means Test should be amended to allow, in the calculation of the net incomes of disabled applicants, deductions for those medical or other living expenses, whether regular or occasional, which are reasonably necessary to the physical and mental welfare of the disabled applicant.

12. To facilitate access by the handicapped to the Legal Aid application procedure, Legal Aid should designate at least one person in each community legal clinic as an Intake Officer for the purpose of processing applications for Legal Aid Certificates. The test should be conducted on the premises, and the Certificate issued if the handicapped applicant qualifies for Legal Aid.

13. All Legal Aid and Clinic offices should be equipped with any mechanical devices necessary to provide services to a disabled client, including appropriate telephone equipment, access to interpreters and physically accessible entrances, offices, and other facilities.

14. Both the Legal Aid system and the Community Legal Clinics should have a more extensive and more widely known outreach program.

15. Arrangements should be made so that Legal Aid applications can be taken over the telephone, for clients who have mobility handicaps.

16. Clinics which are located close to psychiatric facilities should consider organizing outreach programs to reach this special client group.

17. The Legal Aid Committee and the Clinical Funding Committee should establish a general policy that no Legal Aid or Clinic facility should be located in premises which are not or cannot be made fully accessible in entrances, offices, and other facilities.

18. A special one-time accessibility improvement capital fund should be established for the purpose of subsidizing any renovations necessary to make Clinics and Legal Aid Offices fully accessible.

19. Lawyers acting for handicapped clients under Legal Aid Certificates should not have arbitrary limits on the number of consultation hours, provided that they appear to be acting professionally and reasonably in the circumstances.

20. Legal Aid tariffs and the salaries of Clinic lawyers should be raised significantly to recognize both the importance of the lawyer's contribution and the reality of the expense of practising law in Ontario.

21. Special allowances should be made in the Legal Aid disbursement budgets for special medical reports and other services required for handicapped clients.

22. There should be a separate fund provided for Legal Aid disbursements, with clearer guidelines as to what are appropriate disbursements when handicapped clients are involved.

23. The allocation of funds to the Community Legal Clinics should be increased so that the clinics can achieve a permanent level of consistency and effectiveness of legal services.

24. A special fund should be established, under the administration of the Clinical Funding Committee of the Law Society, to allow community Clinics who so wish to hire lawyers and legal advocates to meet the needs of disabled clients. Any Clinic which wished to avail itself of this fund for the purpose of training existing legal staff or hiring new staff would be able to make an application to this fund.

25. The decision whether to develop the special capability to handle services for handicapped or disabled clients should be left with the Board of the Community Legal Clinics, so as not to interfere with their independence or autonomy.

26. Lists of panels of lawyers willing to act on Legal Aid Certificates should include an indication whether the lawyer's office is physically accessible, or whether there is special equipment for telecommunication with the deaf.

27. Legal Aid should compile an additional specialist panel of those lawyers who have special training to act for handicapped clients or have specialized knowledge in the law of the handicapped.

28. Interested members of the legal profession should learn about communication with disabled clients, the lawyer's special responsibilities towards disabled clients and be familiar with the social service and administrative background to the client's problem. Lawyers who have taken such training should form a specialized bar of individuals able and willing to act for disabled clients. These lawyers should be listed according to speciality and geographic location. The list should show which areas of law the lawyer had specialized in; whether the lawyer's offices were physically accessible; whether the lawyer had a special telecommunication device for the deaf; whether the lawyer was willing to see clients in a residential or institutional setting; and whether the lawyer had experience or skill in dealing with mentally disabled clients.

29. To qualify for inclusion on this list, the lawyer will have had to have attended special educational courses, or have a degree of experience deemed appropriate by the Law Society.

30. Training for the specialized bar should be done in consultation with the disabled.

31. A list of specialized lawyers should be established and maintained by the Law Society and the OLSRD (see Recommendation #37).

32. The Law Society should circulate the guidelines for qualification to members of the legal profession; individual members could then apply for inclusion on the list as and when they felt they qualified.

33. In the event of a dispute over qualifications, a committee consisting of a representative from each of the Law Society, the Clinics, Ontario Legal Aid Plan, and the Canadian Bar Association (Ontario Branch), should determine the issue.

34. The compiled list should be made available in Ontario as a reference book to the public and to the profession.

35. The Law Society and various affected groups should consider ways that pro bono legal services can be promoted and enhanced in Ontario. Any system which is established should have a regular monitoring aspect to guarantee that there is consistency in the quality and effectiveness of legal representation.

36. Any list of qualified lawyers who volunteer for pro bono work should be available to all Legal Aid Directors and offices, all Legal Clinics, and to any lawyer in Ontario.

37. There should be a new office called the Office of Legal Services and Resources for the Disabled, established to provide a coordinating structure for the delivery of legal services in Ontario to the disabled.

38. The OLSRD will be able to arrange for the provision of necessary support services for the delivery of legal services.

39. The OLSRD should be a statutory body, in order to better protect its existence. It should make an annual report, presented to the Legislature by the

responsible Minister, who I recommend should be the Attorney General.

40. Funding for the OLSRD should come from a number of involved Ministries including the Ministry of Health, the Ministry of Community and Social Services, the Ministry of the Attorney General, and because of the nature of the service, from the Government of Canada, on a cost-shared basis.

41. To preserve its independence in fact and in appearance, the OLSRD should be accountable to a board of directors consisting largely of individuals who are themsevles disabled or representatives of organiztions for the disabled.

42. The OLSRD should be directed by an Executive Director who would report to the board. Under the Executive Director would be two persons; one responsible for the needs for the physically disabled, and the other responsible for those of the mentally disabled.

43. The OLSRD should be responsible for the administration of all services directly provided by the Office, and for the coordination of other services.

44. A program of legal advocates under the aegis of the OLSRD should be established to visit on a regular and accessible basis individuals in extended care facilities, hospitals, institutions, nursing homes, home for elderly residents, or even private homes where such assistance is required or requested. The advocates' right of access should be protected by statute or regulation to prevent the possibility that a hostile facility would try to keep the advocate off the premises.

45. The advocate's role should be to act as a contact between an individual disabled client and a range of professional services, including legal services.

46. Legislation should provide that communications or disclosures between advocate and a resident or patient should be privileged, as should be the information that the advocate gleans from patient records. The advocate should have free and uninterrupted access to the facilities's records, with the consent of the patient or resident.

47. The advocate should be independent in appearance and fact, and should not be a permenent on-site employee of the facility.

48. Whenever an individual is committed to a facility, the administration of that facility should notify the Office of Legal Services and Resources for the Disabled, which will then contact a regional representative to send an advocate to speak to the patient. The family should also be notified upon the admission of a relative, of the existence of this Office. The advocate at the first meeting, should advise the resident or patient generally of the existence of the service, the rights generally of a patient, and the specific rights of a patient in a psychiatric facility, if relevant. If the patient wishes to pursue these rights, either as a result of that first interview or at some subsequent point during the stay at the facility, the advocate should enlist through the OLSRD office the services of a lawyer to take appropriate legal action or give legal advice.

49. The advocate should be retained by the OLSRD on a contract basis in the same way that Adult Protective Service Workers are now hired. In each part of the Province, there should be lists of appropriate persons with a concentration in those areas where there are hospitals, extended care facilities, psychiatric institutions or homes for

the elderly. The advocate should be extensively and continuously trained not only to be able to identify legal problems, but to be able to communicate with disabled clients as well.

50. The OLSRD should be able to arrange referrals, as well as initial interviews with lawyers. A special arrangement should be made with Legal Aid to permit a system of lawyer selection which would eliminate the necessity of attending at the local Legal Aid Office if this is too great a hardship, or if the local Legal Aid Office is inaccessible either physically, or in its communication system.

51. One or both staff lawyers at the OLSRD should be designated by Legal Aid as Intake Officers for the purposes of processing applications for Certificates. These lawyers would be available to provide information by phone to disabled clients who wish advice on whether there are legal aspects to their problems. In cases where a referral is required, these lawyers could then arrange an interview for the client with an appropriate lawyer.

52. The OLSRD should be physically accessible in every respect, with a complete range of communication devices.

53. The facilities of the OLSRD should be available for use by appointment, by any lawyer who wishes to represent a disabled client, but whose office is inaccessible.

54. Interpreters should be provided for clients who have communication disabilities. The expenses connected with these interpreters should be borne by the State. If the financial resources are not available to implement immediately such a service, priority should be given to clients on the basis of financial need.

55. The OLSRD should provide a referral service for the various kinds of interpreters required to assist clients with communication disabilities.

56. A Training Institute for interpreters should be established in Ontario to train interpreters properly and to provide the skills necessary to interpret in legal situations.

57. The Institute would have a Certificate-granting authority, which would indicate an adequate degree of proficiency on the part of the interpreter.

58. Those interpreters currently providing interpreter services in Ontario courts should be entitled to take the examination for certification without having to attend the full legal interpreter's course.

59. Interpreters should be retained on a contract basis in the same way that legal advocates will be.

60. The interpreter should be contacted as soon as the first interview with the lawyer or legal advocate has been arranged. Legal Aid and the Clinics should ensure the provision of an interpreter when setting up interviews.

61. Police departments should be responsible for calling the OLSRD before attempting to communicate with an accused who has a communication disability. For this reason, an emergency 24-hour interpreter referral service should be available. The interpreter should be present during every interview with the lawyer, advocate or police and at all

times negotations or court proceedings which the client is entitled to attend.

62. Upgrading courses for interpreters should be available through the training institute.

63. Guidelines should be issued and developed on what constitutes proper professional execution of an interpreter's duty. Such a code of ethics should make it clear that an interpreter should not interpret for more than one party in a transaction or proceeding. The basic test of a qualified interpreter's effectiveness should be whether the client himself or herself is satisfied that the views are being properly communicated.

64. Two interpreters should be available for lengthy testimony in order to provide a quality check on the interpretation, and to provide periodic relief.

65. Communications between an interpreter and a client should be privileged when conducted in a solicitor-client context. The interpreter should be protected from being compelled to give evidence as to what was said by the client in the interpretation

of communications between the client and the lawyer or as part of legal proceedings.

66. The OLSRD should develop expertise in education and research in connection with the law of the handicapped, until such time as the Advocacy Research Centre for the Handicapped is able to absorb full responsibility for these services.

67. The OLSRD should explore ways of assisting consumer groups in the training of the various professionals, including lawyers, legal advocates and interpreters, who are involved in delivering legal services to the disabled.

68. More information about the law, Government services, lawyers, legal systems, and legal services should be prepared and widely disseminated to members of the disabled community. The material should be prepared in each case in consultation with the various disabled groups, to be sure that the material prepared is comprehensible to particular client groups. The material should also be aimed at family members, who often constitute a disabled person's first resource in coping with his or her disability.

69. New ways of informing disabled people about the law should be explored, such as closed-captioned television programs, enhanced central Government phone number services with TDD components, or information circulars distributed with Government cheques or information.

70. The Ministry of the Attorney General should have a TDD accessible inquiry number.

71. Pamphlets about the law, as well as major statutes should be produced on cassettes and in large-print formats. Government has an obligation to take a lead in the provision of legal information.

72. There should be a presumption of capacity to instruct counsel on the part of everyone in Ontario. Determinations of incapacity or incompetence for other purposes may be relevant to the issue of capacity to instruct counsel, but should not be determinative.

73. An independent system should be set up through the OLSRD whereby a lawyer who feels that a client lacks capacity to instruct can have that client assessed. The OLSRD should have an approved list

of qualified behavioural scientists, who would be able to advise the lawyer as to the client's capacity. Those assessors who are not paid by the Ontario Hospital Insurance Program, should be compensated out of the OLSRD budget.

74. Where the assessment indicates an inability to instruct counsel, a guardian should be able to be appointed through the OLSRD for the limited purpose of the proposed legal transaction or procedure.

75. Where the assessment confirms the presumption of capacity, the lawyer's role should be to follow and advocate the client's wishes as it would be for any other client.

76. There should be certain circumstances under which the presumption of capacity should exist in any event. For each of these situations, lawyers should automatically be provided through the OLSRD if the client cannot otherwise find counsel. These situations would include proceedings for release from confinement such as those before the Advisory or Regional Review Boards, or habeus corpus proceedings; any proceedings that determine the

person's competency, under the Mental Incompetency Act; and fitness to stand trial hearings in criminal proceedings.

77. The function of representing an individual disabled client in these situations should be carried out by independent lawyers selected through the OLSRD from the specialized bar, rather than through the Public Trustee or the Official Guardian's Office.

78. All legislation dealing with the mentally disabled should be synthesized and clarified, so that rights do not vary according to the geographic or institutional location of the disabled patients.

79. There should be an independent review of the mandate of the Public Trustee with a view to rationalizing and modernizing his role.

80. The right to counsel should be automatic for anyone who is by virtue of mental or physical disability hospitalized or institutionalized.

81. There should be additional due process safeguards built into the procedures before the Advisory and

Regional Review Boards. The Statutory Powers Procedure Act should be made applicable.

82. The Government should proceed to implement, on a priority basis, the recommendations of the Report of the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, particularly as they relate to psychiatric records.

83. The OLSRD should monitor the effectiveness of the legal representation to ensure that the services are being adequately provided, and that the effectiveness of all aspects of representation is maintained at a consistently high level of expertise, availability, and quality.

84. Problems and deficiencies identified by the OLSRD should be communicated to the appropriate Ministry for remedial action.

85. Access to the OLSRD should not be determined on the basis of financial need, but should rather be considered a service to all members of the public who are disabled or who provide legal and related services to them.

86. The OLSRD should be located in Toronto, but should have the ability to make referrals to available qualified personnel in outlying regions or areas. Arrangements should be made for the use of accessible office space throughout the Province, on a shared basis with other offices or agencies. Toll-free telephone lines should be established throughout the Province to the OLSRD, or contacts should be able to be processed by the local Legal Aid offices.

87. The Attorney General should proceed to reform class action procedures in Ontario, based on the recommendations of the Ontario Law Reform Commission. An effective class action procedure would be most helpful in assisting groups of disabled persons to bring litigation to clarify their rights under the Canadian Charter of Rights and Freedoms, or under other legislation.

88. Legal Aid should make more generous allowance for Group Certificates under the Legal Aid Act, so that class actions and group actions can be launched by groups of disadvantaged persons.

89. The Government should consider imposing upon the staff of health care institutions such as extended care facilities, nursing homes, psychiatric or regular hospitals or homes for elderly residents, an obligation to report abuse to the relevant authorities, coupled with the protection against recrimination or disciplinary measures for staff who make such reports.

90. It should be provided by statute that the facilities referred to in Recommendation 89 permit entry onto the premises by any advocate, lawyer or family member wishing access to a patient.

91. To promote renovations to achieve greater access to buildings, the Income Tax Act should be amended to allow as deductions all expenses incurred altering buildings so as to make them accessible.

92. A disabled individual should be able to deduct the full costs of goods and services directly attributable to his or her disability in the compilation of income for the purpose of the Income Tax Act. In particular, additional costs incurred in gaining

access to information, such as special technologies, whether braille, computer or large-print, should also be deductible.

93. The Law Society, Bar Admission Course, and Continuing Legal Education should place a greater emphasis on the law relating to the disadvantaged in general and on the rights and needs of the disabled in particular.

94. Whenever possible, the handicapped themselves should be involved in setting up programs aimed at sensitizing the public and legal profession, including the judiciary, to the special needs and problems of the disabled.

95. The Law Society of Upper Canada's Professional Conduct Handbook should include discussion of problems relating to an individual's capacity to instruct counsel.

96. The Law Society should amend Commentary 4 to Rule 14 of the Code of Professional Conduct to list "handicapped" or "disability" as a proscribed head of discrimination.

97. Law. schools and the Bar Admission Course should make special efforts to make atttendance at those courses, access to materials, and the administration of examinations more readily available to the handicapped law student.

98. The Rules of Practice should be amended to provide that a lawyer who acted in good faith, and in the reasonable belief that a particular client had the capacity to give instructions, should not be penalized by being held personally liable for costs if it is subsequently found that his or her belief was incorrect, and that the client had no such capacity to instruct.

99. The provisions of the Mental Incompetency Act should be revised and reformed in light of current knowledge of the causes and incidence of mental disability, and current interpretations of due process. This examination should take into account the jurisprudence that has developed in interpreting the Act over the years, developments in other juridictions, such as Alberta, and the need to expand committeeship beyond purely estate matters and deal with the non-monetary needs of the mental incompetent.

100. To provide funding for the implementation of the recommendations contained in this report, the Government should consider making use of the accumulated surplus of funds held by the Public Trustee. The provisions of Section 9(5) of the *Public Trustee Act* provide a mechanism for such a diversion of funds. The use of accumulated surplus for this purpose is analogous to the "*cy-près*" principle of the law of trusts.

Appendix A

Ontario

Office of the
Minister

Ministry of the
Attorney
General

416/965-1664

18 King Street East
Toronto Ontario
M5C 1C5

May 25, 1982

Her Honour
Judge Rosalie Silberman Abella
Provincial Court (Family Division)
311 Jarvis Street
TORONTO, Ontario

Dear Judge Abella:

This letter will serve as the terms of reference for your study and review of the accessibility of legal services in Ontario to the handicapped.

I have been concerned for sometime that the legal system in Ontario may contain barriers to those with physical and mental handicaps, seeking access to legal services. I believe that the time has come for a comprehensive review to be undertaken of these difficulties in obtaining legal services, bearing in mind the particular needs and circumstances of a disabled individual. I would like your review to encompass the accessibility of legal services to the handicapped in Ontario and elsewhere, and to assess the effectiveness and appropriateness of those programmes; to determine the special needs of the handicapped in respect of access to legal services; to consider barriers created through difficulty in obtaining access to legal information; and to investigate problems which may prevent the handicapped from participating fully and effectively in the legal process.

I regard this subject as extremely important for all in Ontario. During the International Year of the Disabled, attention was focussed on the special needs of handicapped individuals in need of legal

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services. Although you will not be required to hold public hearings, I hope that you will consult or meet with representatives from the various disabled groups within Ontario to obtain their views on practical steps which can be taken to reduce some of the special problems they face in obtaining access to law. I am pleased that we could agree on the completion of the study by the spring of 1983. I shall look forward at that time to receiving your report.

Yours very truly,

R. Roy McMurtry,
Attorney General.

Appendix B

MEETINGS AND CONSULTATIONS

Advocacy Resource Centre for the Handicapped (ARCH)
  Mr. David Baker
  Ms. Anne Coy
  Ms. Jane Plum
  Mr. Kirby Roe
  Mr. David Rosenfeld
  Mr. Leo Smits
Toronto, Ontario

American Coalition of Citizens with Disabilities
(by Simon Chester)
Mr. Reese Robrahn
Washington, D.C., U.S.A.

American Council for the Blind
(by Simon Chester)
Mr. Scott Marshall
Washington, D.C., U.S.A.

Mrs. C. Jane Arnup
Greenspan and Arnup, Barristers and Solicitors
Toronto, Ontario

Mr. David Baker
Executive Director,
Advocacy Resource Centre for the Handicapped
Toronto, Ontario

Blind Organization of Ontario with Self-Help Tactics
(BOOST)
  Ms. Patti Fuhrman
  Mr. John Rae
  Mr. David Rosenfeld
  Mr. Richard Santos
Toronto, Ontario

Ms. Joan C. Seeley Butler
Barrister and Solicitor
Toronto, Ontario

Canadian Association for the Mentally Retarded
National Legal Resources Service
Mr. Orville Endicott
Downsview, Ontario

Canadian Bar Association
  Ms. Susan Brown
  Ms. Genevieve Chornecki
  Mr. Nicholas Dietrich
  Ms. Wendy Geyer
  Ms. Judith Keene
  Mr. Ray Ostiguy
  Mr. George Strathy
Toronto, Ontario

Canadian Hearing Society
  Ms. Iris Boshes
  Ms. Ann Louise Gagne
  Ms. Diane Guttrez
  Mr. Jim McLaughlin
  Mr. Paul Pellman
Toronto, Ontario

Canadian Law Information Council (CLIC)
Legal Information Secretariat
Ms. Gail Dykstra
Toronto, Ontario

Canadian Legal Advocacy,
Information and Research of the Disabled (CLAIR)
  Mr. Francois Fleury
  Mr. Herman Wierenga
Ottawa, Ontario

Canadian Mental Health Association
  Mr. Howard Richardson, Executive Director
  Ms. Mary Marshall
Toronto, Ontario

Canadian National Institute for the Blind (CNIB)
  Mr. Euclid Herie
  Mr. David Lepofsky
  Ms. Joan McTavish
  Ms. Ann Orr
  Mr. Paul Pellman
  Ms. Sheryl Richeson
Toronto, Ontario

Coalition of Provincial Organizations of the Handicapped (COPOH)
Ms. Pat Israel
Toronto, Ontario

Community Legal Education for Ontario (CLEO)
  Ms. Wendy Geyer
  Ms. Judith Keene
Toronto, Ontario

Disability Rights Education and Defense Fund
(by Simon Chester)
Ms. Nancy Maddocks
Washington, D.C., U.S.A.

Mr. Ron Ellis
Director, Bar Admission Course
Law Society of Upper Canada
Toronto, Ontario

Mr. Orville Endicott
Co-ordinator, National Legal Resources Service
Canadian Association for the Mentally Retarded
Toronto, Ontario

The Honourable Edson L. Haines, Q.C.,
Chairman,
The Lieutenant-Governor's Advisory Review Board
Toronto, Ontario

Industrial Accident Victims Groups of Ontario (IAVGO)
Mr. Brian Cook
Toronto, Ontario

Mr. John Kellerman
Toronto, Ontario

Ms. Claire Kelly
Barrister and Solicitor
Consultant, Canadian Transportation Commission
Ottawa, Ontario

Ms. JoAnn T. Kurtz
Barrister and Solicitor
Toronto, Ontario

Law Society of Upper Canada
Continuing Legal Education
Mr. G.W. Colins-Williams, Q.C.
Toronto, Ontario

Law Society of Upper Canada
Legal Aid Committee
Mr. J.B. Chadwick
Toronto, Ontario

Legal Information Service for the Disabled (LegalISD)
Ms. May Millar
Downsview, Ontario

Mr. David Lepofsky
Counsel, Ontario Ministry of the Attorney General
Toronto, Ontario

Mrs. Joyce M.A. Little
Barrister and Solicitor
Toronto, Ontario

Mental Disability Resource Centre
(by Simon Chester)
American Bar Association Commission on the Mentally Disabled,
Mr. David Rapaport
Washington, D.C., U.S.A.

Mental Health Law Project
(by Simon Chester)
Mr. Norm Rosenberg
Washington, D.C., U.S.A.

Ministry of the Attorney General
Mr. J.D. Ewart
Director, Policy Development Division
Toronto, Ontario

Ministry of the Attorney General
Office Guardian Branch
Mr. L.W. Perry, Q.C.
Official Guardian
Toronto, Ontario

Ministry of the Attorney General
Public Trustee's Branch
Mr. A.J. McComiskey
Public Trustee
Mr. G.K. McClure
Toronto, Ontario

Ministry of Community and Social Services
Children's and Adults' Policy and Program Development Division,
  Mr. Bernard Walter
  Mr. John Wilson
  Ms. Martha Goodings
  Ms. Irene Schaeffer
Toronto, Ontario

Ministry of Health
Dr. Boyd Suttie
Assistant Deputy Minister, Public and Mental Health
Mr. Gilbert Sharpe
Legal Branch
Toronto, Ontario

Multiple Sclerosis Society of Canada
  Mr. Sean Foley
  Ms. Bluebell Planck
  Ms. Jane Plum
  Toronto, Ontario

National Centre for Law and the Deaf
(by Simon Chester)
Mr. Larry Goldburg
Gallaudet College
Washington, D.C., U.S.A.

Office of the Ombudsman
Ms. Katherine Burns, Counsel
Toronto, Ontario

On Our Own
  Ms. Carla McKague
  Mr. Don Weitz
Toronto, Ontario

Ontario Advisory Council on the Physically Disabled
Mr. Jack Longman
Chairman
Toronto, Ontario

Ontario Advisory Council on Senior Citizens
Mrs. Frances McHale
Chairman
Toronto, Ontario

Ontario Association for the Mentally Retarded
Ms. Trish Bragen-Spindel
Toronto, Ontario

Ontario Hospital Association
Mr. Gordon R. Cunningham
Executive Director
Toronto, Ontario

Ontario Human Rights Commission
Canon Borden Purcell
Chairman
Ms. Sita Ramanujam
Toronto, Ontario

Ontario Legal Aid Plan
  Mr. Andrew M. Lawson,
  Director
  Mr. John Beaufoy,
  Public Information Officer
  Mr. Russ Otter,
  Area Director, Toronto
  Ms. Kay Fleming,
  Chairman, Sub-Committee on Legal Aid and the Handicapped
Toronto, Ontario

Ontario Legal Aid Plan
Clinic Funding Committee
  Mr. Ross Irwin
  Ms. Mary Jane Mossman
Toronto, Ontario

Ontario March of Dimes
  Mr. Gerry Lucas
  Mr. Michael Berman
Toronto, Ontario

Patient's Rights Association
Ms. Anne Coy
Toronto, Ontario

Research, Education and Advocacy Centre for the Handicapped,
Mr. Lawrence Greenspon
Ottawa, Ontario

Mr. Harvey S. Savage
Barrister and Solicitor
Toronto, Ontario

Secretariat for Disabled Persons
Ms. Liz Flavelle
Toronto, Ontario

Special Committee on the Disabled and Handicapped
  Mr. David Smith, M.P.,
  Chairman
  Ms. Barbara Reynolds
Ottawa, Ontario

Mr. Barry B. Swadron
Swadron, Brown Barristers and Solicitors
Toronto, Ontario

Mr. Peter Tobias, Q.C.
Bencher, Law Society of Upper Canada
Tobias, Bagshaw Barristers and Solicitors
Hunstville, Ontario

United States Department of Justice
(by Simon Chester)
Civil Rights Division
Special Litigation
  Mr. Tim Cook
  Mr. John Wodatch
Washington, D.C., U.S.A.

Appendix C

ORGANIZATIONS AND INDIVIDUALS FROM WHOM SUBMISSIONS OR SUGGESTIONS WERE RECEIVED

Advocacy Resource Centre for the Handicapped (ARCH)
Toronto, Ontario

Alberta Department of the Attorney General
Mr. R.F. Robertson
Manager, Executive Secretariat
Edmonton, Alberta

Autonomie
Ms. Ferne Marshall
President
Montreal, Quebec

Mr. David Baker
Executive Director,
Advocacy Resource Centre for the Handicapped (ARCH)
Toronto, Ontario

Ms. Wendy G. Baker
Barrister and Solicitor
Vancouver, British Columbia

Mr. Joseph E. Berube
Ombudsman, New Brunswick
Fredericton, New Brunswick

Blind Organization of Ontario with Self-Help Tactics (BOOST)
Toronto, Ontario

Dr. Elizabeth Bloomfield
Ontario Society for Autistic Children
Wellington County Chapter
Guelph, Ontario

Bobier Convalescent Home
Dutton, Ontario

British Columbia, Ministry of the Attorney General
Mr. John Morton
Barrister and Solicitor, Family Law and Social Services Department Civil Law Division
Victoria, British Columbia

Canadian Association for the Mentally Retarded
Toronto, Ontario

Canadian Association for the Mentally Retarded,
British Columbia Branch
Mr. A.J. Eddy
Vancouver, British Columbia

Canadian Bar Association Young Lawyers' Section
Mr. Pierre-Yves Châtillon
Ottawa, Ontario

Canadian Co-ordinating Council on Deafness
Mr. K. George Wolf
Ottawa, Ontario

Canadian Hearing Society
Toronto, Ontario

Canadian Law Information Council
Ottawa, Ontario

Canadian Legal Advocacy Information and Research of the Disabled (CLAIR)
Ms. Penny McKinlay
Chairperson
Ottawa, Ontario

Canadian Mental Health Association, Ontario Division
Mr. H.E. Richardson
Executive Director
Toronto, Ontario

Canadian National Institute for the Blind (CNIB)
Toronto, Ontario

Canadian Paraplegic Association, Ontario Division
Mr. W. Kirby Rowe
Toronto, Ontario

Canadian Rehabilitation Council for the Disabled
Mrs. M. Vasey
Director, Information Services
Toronto, Ontario

Canadian Transport Commission
Ms. Deana B. Silverstone
Counsel
Ottawa, Ontario

Cerebral Palsy Association
Ms. Rosemari Commisso
Co-ordinator of Services for the Physically Disabled
Windsor, Ontario

City of Toronto Planning and Development Department
Ms. Martha Bobrovskis
Toronto, Ontario

Mrs. Edith Clement
Richmond Hill, Ontario

Coalition of Provincial Organizations of the Handicapped (COPOH)
Mr. Bill White
Co-ordinator
Winnipeg, Manitoba

Coalition of Psychiatric Services
Toronto, Ontario

Collingwood and District Disabled Club
Mr. Don Warden
Co-ordinator
Stayner, Ontario

Community Legal Education for Ontario (CLEO)
Toronto, Ontario

Community Occupational Therapy Associates
Ms. K. Goldenburg
Executive Director
Ms. H. Goldlist
Senior Occupational Therapist
Toronto, Ontario

Concerned Friends of Ontario Citizens in Care Facilities, Inc.
Toronto, Ontario

Concerned Friends of Patients in Care Facilities
Ms. Grace Feltham
President
Toronto, Ontario

Department of Justice
Mr. Guy Faggiolo
Advisory and Administrative Law
Mr. David Solberg
Policy Planning and Criminal Law Amendments
Ottawa, Ontario

District of Timiskaming Health Centre
Mr. Brian Primrose
New Liskeard, Ontario

Extendicare/Sudbury
Ms. Gale Murray
Administrator
Sudbury, Ontario

Mr. Hugh L. Fraser
Barrister and Solicitor
Gloucester, Ontario

Friends and Advocates
Ms. Pat Black
Co-ordinator
Weston, Ontario

Ms. Deborah Gardner
Community Legal Aid
Faculty of Law
University of Windsor
Windsor, Ontario

Mr. Larry O. Gostin
Visiting Fellow
Oxford University Centre for Criminology
Former Legal Director of MIND (Britain's National Association for Mental Health)
London, England

The Happy Wheelers
Mrs. Catherine Allen
President
Woodstock, Ontario

Mr. E.J. Herie
Executive Director
Ontario Divison,
Canadian National Institute for the Blind
Toronto, Ontario

Ms. Brenda Hoggett
Reader in Law
University of Manchester
Manchester, England

Houselink Community Homes
Toronto, Ontario

Human Interaction Research Institute
Mr. Paul D. Greenburg
Los Angeles, California

Industrial Accident Victims Group of Ontario (IAVGO)
Mr. Brian Cook
Toronto, Ontario

Injured Workers' Consultants
Mr. Nick McCombie
Toronto, Ontario

John Howard Society of Alberta
Ms. Marlene Brouwer
Calgary, Alberta

Kingston and District Social Planning Council
Mr. Andrew Roberts
Executive Director
Kingston, Ontario

Law Foundation of Now Scotia
Ms. Mary Burbidge-Helliener
Executive Director
Halifax, Nova Scotia

Legal Information Service for Disabled Persons
(LegalISD)
Ms. May Millar
Downsview, Ontario

Legal Services Society of British Columbia
Ms. Penny Bain
Vancouver, British Columbia

Mr. William J. Lefley
Peterborough, Ontario

M. Jacques Lemâitre-Auger
Secretary
Commission des services juridiques
Montreal, Quebec

Mr. Jack Longman
Chairman
Ontario Advisory Council on the Physically Disabled
Toronto, Ontario

Professor Colin Low
Faculty of Law
Leeds University
Leeds, England

Low Vision Association of Ontario
Mr. Bill Carroll
Toronto, Ontario

Mr. L.W. McKerrow
Administrator
Penetanguishene Mental Health Centre
Penetanguishene, Ontario

Metro Area Community Service Board for the Deaf
Ms. Brenda Allen
Executive Director
Halifax, Nova Scotia

Ministry of the Attorney General
Mr. W.M. Thompson
Courts and Office Accommodation Planning
Toronto, Ontario

Ministry of Community and Social Services
Policy and Program Development Division
Toronto, Ontario

Ministry of Community and Social Services
Northwest Regional Centre
Father J.A. Rice
Director
Thunder Bay, Ontario

Ministry of Community and Social Services
Southwest Regional Centre
Mr. D.M. Kinzie
Director, Community Services
London, Ontario

Ministry of Community and Social Services
Employment and Rehabilitation Program
Hamilton Area Office
Ms. Noreen Toye
Supervisor
Hamilton, Ontario

Ms. Mary Jane Mossman
Clinic Funding Manager
The Ontario Legal Aid Plan
Toronto, Ontario

Muscular Dystrophy Association of Canada
Mr. John G. Connors
Executive Director
Toronto, Ontario

National Centre for State Courts
Institute on Mental Disability and the Law
Mr. Ingo Keilitz
Director
Williamsburg, Virginia

Newfoundland Legal Aid Commission
Mr. Christopher P. Curran
Staff Solicitor
St. John's, Newfoundland

Office of the Ombudsman
Mr. Mark Nantais
Executive Assistant
Toronto, Ontario

On Our Own: Ontario Patients' Self-Help Association
Toronto, Ontario

Ontario Advisory Council on the Physically Disabled
Mr. Jack Longman
Chairman
Toronto, Ontario

Ontario Advisory Council on Senior Citizens
Ms. Frances McHale
Chairman
Toronto, Ontario

Ontario Association for Children with Learning Disabilities
Ms. Rosemary Underwood
Executive Director
Toronto, Ontario

Ontario Association for the Mentally Retarded
Mr. Harry Beatty
Legal Counsel
Toronto, Ontario

Ontario Citizen Advocacy
Mr. Angelo Ottolino
Co-ordinator
Toronto, Ontario

Ontario Crippled Children's Centre
Mrs. Jane I. Staub
Director
Psychological Services
Toronto, Ontario

Ontario Human Rights Commission
Toronto, Ontario

Ontario Legal Aid Plan
Mr. Russell J. Otter
Area Director
Toronto, Ontario

Ontario March of Dimes
Toronto, Ontario

Operation Life (Private Transportation Company)
Mrs. I.W. Harding
Director of Funding
Brantford, Ontario

The Honourable Gerald R. Ottenheimer
Newfoundland Minister of Justice and Attorney General
St. John's, Newfoundland

Mr. Yves Ouellette
Doyen, Faculte de droit
Universite de Montreal
Montreal, Quebec

Patient's Rights Association
Toronto, Ontario

Mr. Paul S. Pellman
Barrister and Solicitor
Toronto, Ontario

The People's Law School
Ms. Margaret M. Hales
Executive Director
Vancouver, British Columbia

Mrs. Beryl Potter, OMC
Action Awareness
Scarborough, Ontario

Prince Edward Island Council of the Disabled
Mr. Kegin K. Edgecambe
Executive Director
Charlottetown, Prince Edward Island

Prince Edward Island Human Rights Commission
Mr. Thomas W. Klewin
Executive Director
Charlottetown, Prince Edward Island

Public Legal Education and Legal Resource Centre
Ms. Nancy Hannum
Fieldworker
Vancouver, British Columbia

M. Paul-Émile Racine
Le Protecteur du Citoyen
Montreal, Quebec

Rehabilitation Institute of Ottawa
Mr. Bruce Girvan
Ottawa, Ontario

Research, Education and Advocacy Centre for the Handicapped
Ottawa, Ontario

Mr. Lyman R. Robinson
Dean of Law
University of Victoria
Victoria, British Columbia

Mr. T.W. Roper
Minister of Health
Victoria
Melbourne, Australia

Professor J.W. Samuels
Faculty of Law
University of Western Ontario
London, Ontario

Sarnia and District Association for the Mentally Retarded
Mr. Casey Huisman
Director
Residential Services
Sarnia, Ontario

Saskatchewan Department of the Attorney General
Mr. Richard Gosse
Deputy Attorney General
Regina, Saskatchewan

Sault Ste. Marie Association for the Mentally Retarded
Ms. B.A. Jackson
Sault Ste. Marie, Ontario

Ms. Debbie Smith
Executive Director
Canadian Association for the Mentally Retarded, Nova Scotia Division
Dartmouth, Nova Scotia

Professor M.A. Somerville
Faculty of Law
McGill University
Montreal, Quebec

Social Planning Council of Amherstburg-Anderdon-Malden
Ms. Frances Stone
Co-ordinator
Amherstburg, Ontario

Social Planning Council of Niagara Falls
Mr. A. Peter Marshall
Co-ordinator
Nigara Falls, Ontario

Special Committee on the Disabled and Handicapped
Mr. David Smith, M.P.,
Chairman
Dr. Bruce Halliday, M.P.
Mr. Neil Young, M.P.
House of Commons
Ottawa, Ontario

Toronto Hard of Hearing Club
Mrs. L. Allen
President
Toronto, Ontario

His Honour Judge J.B. Varcoe
Provincial Court of British Columbia
Maple Ridge, British Columbia

Mr. David H. Vickers
Barrister and Solicitor
Victoria, British Columbia

War Amputations of Canada
Mr. H.C. Chadderton, CM, CAE
Ottawa, Ontario

Mr. Don Weitz
Toronto, Ontario

Western Institute for the Deaf
(Member, Legal Services Society of British Columbia)
Mr. James F. McLaughlin
Staff Counsel
Vancouver, British Columbia

Yukon Department of Health and Human Resources
Ms. Marg Render
Co-ordinator
Vocational and Rehabilitation Services
Whitehorse, Yukon

Yukon Department of Justice
Mr. P. O'Donoghue
Deputy Minister of Justice
Whitehorse, Yukon

Professor Frederick H. Zemans
Osgoode Hall Law School
York University
Toronto, Ontario

Appendix D

LIST OF CASES

CANADA

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Appendix E

LIST OF STATUTES

CANADA

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Ontario

NEWS RELEASE
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Ministry of
the Attorney
General

Ministère
du Procureur
général

M. MCMURTRY DIVULGUE LE RAPPORT SUR L'ACCÈS DES PERSONNES HANDICAPÉES AUX SERVICES JURIDIQUES

Le 6 septembre 1983

Le système juridique de l'Ontario devrait être plus accessible aux résidents handicapés et mieux répondre à leurs besoins. Ce sont les conclusions d'une étude dirigée par son honneur le juge Rosalie Abella sur l'accès des personnes handicapées aux services juridiques. C'est le procureur général M. Roy McMurtry qui a présenté ce rapport aujourd'hui.

"Une société qui s'est engagée à promouvoir et à protéger les droits des personnes désavantagées est par là même tenue de leur procurer un accès aux services juridiques pour qu'elles puissent faire valoir leurs droits et les défendre," déclare le juge Abella. L'étude, qui est le fruit de consultations avec de nombreux organismes s'occupant des personnes handicapées, constate que de nombreuses dispositions ont été prises dans la prestation de services juridiques.

"Toutefois, ces services ne sont pas coordonnés et sont fragmentés. Ils sont concentrés dans les grands centres urbains et subsistent grâce au dévouement d'un petit groupe de personnes aux ressources limitées, accablées par le nombre de dossiers."

"L'Ontario a besoin de mieux coordonner l'approche du problème de la prestation de services juridiques aux personnes handicapées. Nous devons aussi développer les réseaux existants et utiliser la bonne volonté et l'expertise qui existent parmi les avocats. Et nous avons besoin de ressources adéquates pour tout cela," a déclaré le juge Abella.

À cette fin, elle présente une centaine de recommandations au gouvernement, aux avocats et à la communauté en vue de rendre la prestation de services juridiques plus efficace.

On propose, entre autres, d'établir un bureau de services juridiques et de ressources pour les personnes handicapées, un centre de coordination qui fournira les services juridiques et auxilliaires aux personnes handicapées. Ce centre devrait être chargé de fournir des services d'interprétation pour les sourds-muets et de superviser un groupe d'avocats pour les internés.

M. McMurtry a accueilli favorablement le rapport. "Je serai heureux de prendre connaissance avec mes collègues de l'étude importante et pleine d'idées du juge Abella, qui donne de nouvelles orientations pour les services juridiques au Canada", a-t-il déclaré.

Pour que le rapport soit accessible à toutes les personnes intéressées, on le fait enregistrer sur cassette par la bibliothèque sonore de Trent. Il est également imprimé en gros caractères.

Renseignements : Annie-Côté-Kennedy
965-9111

L'"Advocacy Resource Centre for the Handicapped" tiendra une conférence de presse aujourd'hui, à 3 heures, à la salle de la presse, du Parlement-bâtiment principal.

RESUME DES RECOMMANDATIONS

1. Tout développement, législation ou programme à l'intention des handicapés et des infirmes doit dorénavant s'inspirer du principe d'un droit à l'accès égal aux services juridiques.

2. Etant donné l'importance critique de l'accès aux services juridiques pour permettre aux handicapés d'atteindre leurs objectifs d'égalité, d'indépendance et de normalisation, le gouvernement, la société et la profession juridique doivent entreprendre un grand effort pour prévoir une qualité efficace de services juridiques.

3. Les facultés de droit devraient développer des cours spéciaux afin de traiter des besoins des handicapés et des infirmes.

4. Les facultés de droit devraient intégrer aux autres matières telles que le droit constitutionnel, le droit pénal, le droit de la famille, des éléments traitant des besoins juridiques des handicapés.

5. Dans le cadre du cours d'admission au barreau, il devrait y avoir une formation obligatoire sur ces aspects de la relation avocat-client que rencontrera l'avocat agissant pour le compte d'un client infirme.

6. Comment mieux agir pour des clients ayant des handicaps mentaux ou physiques devrait faire l'objet de cours de formation professionnelle permanente.

7. Afin de faciliter l'accès aux locaux de la cour à ceux dont les handicaps limitent la mobilité, les responsables de

l'architecture et de la planification de ces locaux devraient consulter les handicapés afin de développer des normes d'accès satisfaisantes.

8. La coordination et le lien entre l'aide juridique et le système de cliniques communautaires pour l'offre de services juridiques devraient faire l'objet d'une étude supplémentaire.

9. Il faudrait étudier d'autres moyens de prévoir une contribution des professions juridiques au financement de l'aide juridique autre que la contribution obligatoire de 25 % imposée à ceux qui opèrent sous l'égide d'un certificat d'aide juridique. Il faudrait redistribuer d'une façon plus équitable cette responsabilité afin qu'elle ne soit pas uniquement le fardeau de ceux qui acceptent les dossiers d'aide juridique.

10. Il faudrait rechercher d'autres moyens de prélever des fonds pour les services juridiques publics, afin d'assurer une qualité toujours efficace de ces services pour l'ensemble du public lorsque celui-ci y fera appel.

11. Il faudrait modifier l'Enquête sur la situation financière pour l'admissibilité à l'aide juridique en prévoyant dans le calcul du revenu net des requérants handicapés les déductions d'ordre médical ou autres dépenses, qu'elles soient habituelles ou occasionnelles, qui sont nécessaires de façon raisonnable pour le bien-être physique et mental du requérant handicapé.

12. Afin de faciliter pour les handicapés les procédures de demande d'aide juridique, l'aide juridique devrait désigner au moins une personne dans chaque clinique juridique communautaire comme officier chargé de traiter des demandes

de certificats d'aide juridique. L'enquête devrait être faite sur les lieux, et le certificat devrait être émis sur le champ si le requérant handicapé est admissible à l'aide juridique.

13. Il faudrait équiper les bureaux d'aide juridique et les cliniques d'aide juridique de tout matériel nécessaire pour dispenser les services aux clients handicapés,y compris l'équipement téléphonique approprié, l'accès aux interprêtes, les entrées accessibles et autres facilités conçues pour faciliter les déplacements des handicapés.

14. Le système d'aide juridique et les cliniques communautaires d'aide juridique devraient avoir un plus vaste programme communautaire dont l'existence serait mieux connue.

15. Il faudrait prévoir la possibilité que les clients ayant des handicaps limitant leur mobilité puissent présenter des demandes d'aide juridique par téléphone.

16. Les cliniques situées à proximité des institutions psychiatriques devraient considérer l'organisation de programmes communautaires afin d'atteindre ce groupe spécial.

17. Le comité d'aide juridique et le Comité de financement des cliniques devraient avoir comme politique générale que tout bureau d'aide juridique ou clinique devrait être situé dans des locaux dont les entrées, bureaux et autres facilités seraient totalement accessibles ou pourraient être rendus totalement accessibles aux handicapés.

18. Afin d'apporter une aide financière pour les rénovations nécessaires en vue de rendre les cliniques et les bureaux

d'aide juridique totalement accessibles, il faudrait établir un fonds de capital spécial pour améliorer l'accessibilité. Les octrois à partir de ce fonds seraient accordés une fois seulement.

19. On ne devrait pas imposer de limites arbitraires aux avocats agissant pour des clients handicapés sous l'égide d'un certificat d'aide juridique, quant aux heures de consultation pour autant qu'ils semblent agir de façon professionnelle et raisonnable dans les circonstances.

20. Il faudrait augmenter de façon importante les tarifs d'aide juridique et les salaires des avocats des cliniques, afin de reconnaître à la fois l'importance de la contribution de l'avocat et la réalité de ce que peut occasionner en fait de dépenses, la pratique du droit en Ontario.

21. Des allocations spéciales devraient être prévues dans les budgets de dépenses d'aide juridique pour les rapports médicaux spéciaux et autres services nécessaires pour les clients handicapés.

22. Il devrait y avoir un fonds distinct, prévu pour les dépenses d'aide juridique, avec des normes plus claires quant aux dépenses acceptables lorsqu'il s'agit de clients handicapés.

23. Il faudrait augmenter les sommes attribuées aux cliniques d'aide juridique afin que ces cliniques puissent atteindre et conserver un niveau supérieur d'efficacité des services juridiques.

24. Un fonds spécial devrait être établi sous l'égide du Comité de financement des cliniques de la Société du barreau, afin

de permettre aux cliniques communautaires qui le veulent d'engager des avocats et des conseillers juridiques pouvant répondre aux besoins des clients handicapés. Toute clinique qui voudrait se prévaloir de ce fonds pour la formation du personnel juridique déjà en place ou pour le recrutement de nouveau personnel, devrait pouvoir faire une demande auprès de ce fonds.

25. Il faudrait laisser au Conseil des cliniques d'aide juridique la décision de développer ou non la capacité spéciale pour offrir des services aux handicapés, afin de ne pas porter atteinte à son indépendance et son autonomie.

26. Les tableaux d'avocats qui consentent à agir sous l'égide de certificats d'aide juridique devraient indiquer la facilité d'accès aux bureaux de ces avocats et s'ils possèdent de l'équipement spécial de télécommunication pour les personnes atteintes de surdité.

27. L'aide juridique devrait établir un autre tableau de spécialisations, et y inscrire les avocats qui ont reçu une formation spéciale leur permettant d'agir pour les clients handicapés et les avocats qui ont une connaissance spécialisée du droit s'appliquant aux handicapés.

28. Les avocats intéressés devraient se perfectionner dans la communication avec les clients handicapés et étudier les responsabilités spéciales à l'égard des clients handicapés. Ils devraient se familiariser avec les services sociaux et administratifs s'appliquant aux problèmes du client. Les avocats qui ont fait l'objet d'une telle formation devraient être inscrits sur une liste spéciale d'avocats qui sont disposés à agir pour des clients handicapés. On devrait aussi

établir une liste de ces avocats selon leur spécialité et l'endroit. Cette liste indiquerait aussi l'accessibilité aux locaux de l'avocat, la disponibilité d'équipements de télécommunication pour ceux qui sont atteints de surdité, si l'avocat est prêt à se rendre dans des institutions ou à domicile pour servir des clients, et si l'avocat possède l'expérience ou l'habilité de traiter avec les clients handicapés mentalement.

29. Pour figurer sur cette liste, l'avocat devra suivre des cours de formation spécialisée ou posséder une expérience jugée appropriée par la Société du barreau.

30. La formation de ce barreau spécialisé devrait se donner en consultation avec les handicapés.

31. La liste d'avocats spécialisés devrait être établie et maintenue par la Société du barreau et l'OSRJH (voir la Recommandation #37).

32. La Société du barreau devrait distribuer les normes pour l'admission à cette liste aux membres du barreau, permettant ainsi à ceux qui le désirent d'en faire partie et d'en faire la demande lorsqu'ils se croient qualifiés.

33. Lors d'une dispute au sujet des qualifications, un comité constitué d'un représentant de la Société du barreau, des cliniques, du Plan d'aide juridique et de l'Association du barreau canadien (section de l'Ontario) devrait trancher la question.

34. La liste devrait être disponible en tant qu'oeuvre de référence au public et à la profession.

35. La Société du barreau et les groupes intéressés devraient considérer les moyens de promouvoir et d'améliorer l'offre bénévole des services juridiques en Ontario. Tout système qui pourrait être établi devrait prévoir un contrôle afin de garantir une qualité et une efficacité constantes de services des avocats.

36. Toute liste d'avocats qualifiés qui acceptent d'offrir bénévolement leurs services devrait être disponible à tous les directeurs des bureaux d'aide juridique, aux cliniques juridiques et à tout avocat de l'Ontario.

37. Il devrait y avoir un nouvel organisme, dénommé "Office des services et ressources juridiques pour les handicapés" (OSRJH), qui serait une structure de coordination des services juridiques en Ontario aux handicapés.

38. L'OSRJH s'occupera des services de soutien pour les services juridiques.

39. L'OSRJH devrait être établi par la loi afin de mieux assurer sa survie. Il devrait publier un rapport annuel qui serait présenté à l'Assemblée législative par le ministre responsable. Je recommande que ce ministre soit le Procureur général.

40. Les fonds de l'OSRJH devraient parvenir des ministères impliqués, y compris le ministère de la Santé, le ministère des Services sociaux et communautaires, le ministère du Procureur général et, à cause de la nature de ces services, du Gouvernement du Canada, sur une base de péréquation.

41. En vue de préserver son indépendance de fait et la perception de cette indépendance, l'OSRJH devrait répondre à un conseil

de direction qui serait formé surtout de personnes elles-mêmes handicapées ou représentantes d'organismes de personnes handicapées.

42. L'OSRJH devrait être dirigé par un directeur général responsable devant le Conseil de direction. Deux personnes répondraient au Directeur général: une personne responsable pour les besoins des handicapés physiques, et une autre personne responsable pour les besoins des handicapés mentaux.

43. L'OSRJH devrait être responsable pour l'administration de tous les services fournis directement par l'Office, et la coordination de tous les autres services.

44. Un programme de conseillers judiciaires, sous l'égide de l'OSRJH, devrait être établi pour prévoir des visites régulières sans entraves auprès des personnes qui se trouvent dans des facilités de soins chroniques, des hôpitaux, des institutions, des foyers nourriciers, des foyers pour personnes âgées, ou même des résidences privées, lorsqu'une telle aide est requise ou demandée. Le droit d'accès des conseillers devrait être prévu par une loi ou un règlement afin d'empêcher toute possibilité qu'une institution hostile porte entrave à cet accès.

45. Le rôle du conseiller serait d'agir comme personne contact entre un client handicapé et la gamme des services professionnels, y compris les services juridiques.

46. Une loi devrait prévoir que les communications entre un conseiller et un résident ou patient devraient être privilégiées, comme devraient l'être les renseignements que le conseiller

pourrait obtenir des dossiers médicaux. Le conseiller devrait avoir libre accès aux dossiers de l'institution, avec le consentement du patient ou résidant.

47. Le conseiller devrait avoir l'apparence d'être indépendant et l'être de fait, et ne devrait pas être un employé permanent sur les lieux d'une institution.

48. L'institution à qui l'on confie la garde d'un handicapé devrait en avertir l'Office de services et ressources juridiques pour les handicapés qui se mettra en contact avec le représentant régional afin qu'un conseiller se rende sur place pour parler au patient. Lors de l'admission d'un de ses membres, une famille devrait être avisée de l'existence de cet Office. Le conseiller devrait en aviser le résident ou le patient lors de la première rencontre et traiter aussi de façon générale des droits du patient et, s'il y a lieu, des droits particuliers qui s'appliquent au patient dans une institution psychiatrique. Si le patient cherche à se prévaloir de ces droits, soit à la suite de la première rencontre, soit plus tard lors de son séjour à cette institution, le conseiller devrait avoir recours aux services d'un avocat par l'entremise de l'OSRJH afin d'entreprendre les recours judiciaires appropriés ou pour des conseils juridiques.

49. Le conseiller devrait être recruté à contrat pour l'OSRJH, de la même façon qu'un agent du Service de protection des adultes. A travers la province, il devrait exister des listes de personnes appropriées, particulièrement dans les régions où se situent les hôpitaux, institutions, foyers nourriciers, foyers pour personnes âgées. La formation intense et permanente du conseiller devrait s'appliquer non seulement à l'identification des problèmes juridiques, mais aussi aux communications avec les clients handicapés.

50. L'OSRJH devrait être en mesure de renvoyer la personne handicapé à un avocat et fixer les premières rencontres. Une entente devrait être conclue avec l'aide juridique afin d'établir un système de sélection d'avocats où il ne serait plus nécessaire de se présenter aux locaux du bureau d'aide juridique si cela posait de trop graves inconvénients, si le bureau d'aide juridique n'est pas aisément accessible ou s'il ne possède pas de système de communication approprié.

51. Soit l'un ou les deux avocats de l'OSRJH devraient être désignés par l'aide juridique comme officiers pour recevoir les demandes de certificats. Ces avocats seraient disponibles pour donner les renseignements au téléphone aux clients handicapés qui cherchent à savoir si leurs problèmes comportent certains aspects juridiques. Lorsqu'il s'agit de renvoyer une personne à un avocat, ceux-ci pourraient établir une entrevue avec un avocat approprié.

52. On devrait pouvoir accéder sans entraves aux locaux de l'OSRJH qui devraient posséder une gamme complète d'équipements de communication spécialisés à l'intention des handicapés.

53. Un avocat qui veut agir pour un client handicapé, mais dont le bureau n'est pas aisément accessible devrait pouvoir utiliser les locaux de l'OSRJH pour ce rendez-vous.

54. On devrait fournir des interprètes payés par l'Etat aux clients dont les handicaps limitent la capacité de communiquer. Si les ressources financières ne permettent pas encore de mettre un tel service en vigueur immédiatement, on devrait accorder la priorité aux clients selon leurs moyens.

55. L'OSRJH devrait maintenir un service permettant d'entrer en contact avec des interprètes de toutes spécialités pour aider les clients atteints de handicaps limitant leur capacité de communiquer.

56. Un Institut de formation d'interprètes devrait être établi en Ontario afin de former convenablement les interprètes et de s'assurer qu'ils possèdent la compétence nécessaire pour agir comme interprètes dans un contexte judiciaire.

57. L'Institut devrait être autorisé à émettre des certificats qui reconnaîtraient un niveau suffisant de compétences chez l'interprète.

58. Les interprètes qui agissent actuellement devant les tribunaux de l'Ontario devraient avoir le droit de subir l'examen préalable à la certification sans avoir à suivre le cours d'interprète juridique au complet.

59. Les interprètes devraient agir à contrat, au même titre que les conseillers juridiques.

60. Il faudrait donc entrer en contact avec l'interprète dès que la première rencontre avec l'avocat ou le conseiller juridique a été établie. L'aide juridique et les cliniques juridiques devraient s'assurer de la présence de l'interprète lorsqu'ils établissent les rencontres.

61. Les forces policières devraient avoir la responsabilité d'entrer en contact avec l'OSRJH avant de tenter de communiquer avec un accusé atteint d'un handicap qui limite sa capacité de communiquer. C'est pour cette raison qu'un service d'urgence d'interprétation devrait être disponible 24 heures par jour. L'interprète devrait assister à chaque rencontre avec l'avocat, le conseiller ou la police, et à chaque procédure judiciaire ou de négociations auxquelles le client a le droit d'assister.

62. Des cours de formation permanente pour interprètes devraient être disponibles par l'entremise de l'Institut de formation.

63. Il faudrait développer et émettre des normes régissant l'exercice du devoir professionnel de l'interprète. Un tel Code de déontologie devrait préciser que l'interprète ne peut agir pour le compte de plus d'une partie dans une transaction ou une procédure. C'est lorsque le client lui-même est satisfait que l'on communique correctement sa façon de penser que l'efficacité de l'interprète qualifiée en est ainsi vérifiée.

64. Deux interprètes devraient être disponibles pour une longue procédure afin de permettre le contrôle de la qualité de l'interprétation et l'occasion pour chaque interprète de se reposer.

65. Les communications entre un interprète et le client devraient être privilégiées lorsqu'elles sont établies dans un contexte avocat-client. On ne devrait pas pouvoir contraindre un interprète à témoigner au sujet des communications entre le client et l'avocat ou dans le cadre de procédures judiciaires.

66. L'OSRJH devrait développer une expertise dans l'enseignement et la recherche en ce qui a trait au droit des handicapés jusqu'à ce que le Centre de recherche sur la représentation des handicapés puisse accepter la pleine responsabilité pour ce service.

67. L'OSRJH devrait rechercher des façons d'aider les groupes de consommateurs dans la formation de divers professionnels, y compris les avocats, conseillers juridiques et interprètes, et ceux qui participent à l'offre de services juridiques aux handicapés.

68. On devrait établir et distribuer largement aux membres des communautés des handicapés davantage de renseignements sur le droit, les services gouvernementaux, les avocats, le système juridique et les services juridiques. Ce matériel devrait toujours être établi en consultant les divers groupes de handicapés afin de s'assurer que ce matériel est à la portée de chaque groupe. Il devrait aussi s'adresser à la famille, vers laquelle le handicapé se tourne d'abord pour l'aider à vivre avec son handicap.

69. On devrait rechercher de nouvelles façons de renseigner les handicapés sur leurs droits, à l'aide par exemple d'émissions télévisées avec sous-titres codés, un service téléphonique gouvernemental amélioré comprenant les appareils de télécommunication pour malentendants (AME) ou des brochures distribuées avec les chèques ou autres renseignements du gouvernement.

70. Le ministère du Procureur général devrait avoir un numéro de téléphone de renseignements accessible aux appareils pour malentendants.

71. Les brochures sur divers aspects du droit, ainsi que les lois les plus importantes, devraient être disponibles en cassettes et en format gros caractères. Le gouvernement a l'obligation d'être à l'avant-garde dans la diffusion de renseignements juridiques.

72. En Ontario, on doit présumer que tous possèdent la capacité de donner des instructions à leurs avocats. Le manque de capacité ou d'habileté pour tout autre aspect peut être pertinent à la détermination de la capacité de donner ses instructions à son avocat, mais ne doit pas trancher la question.

73. Il faudrait établir un système indépendant par l'entremise de l'OSRJH auquel l'avocat peut avoir recours lorsqu'il considère que son client manque de capacité pour lui donner des instructions afin que ce client soit évalué. L'OSRJH devrait avoir une liste approuvée de professionnels qualifiés dans le domaine du comportement, qui seraient en mesure de conseiller l'avocat quant à la capacité du client. Les évaluateurs qui ne seraient pas indemnisés par le Plan d'assurance-maladie de l'Ontario, devraient recevoir leur indemnisation à partir du budget de l'OSRJH.

74. Lorsque l'évaluation indique une incapacité à donner des instructions à son avocat, l'on devrait pouvoir nommer un tuteur par l'entremise de l'OSRJH, mais uniquement pour la procédure ou la transaction judiciaire envisagée.

75. Lorsque l'évaluation confirme la présomption de capacité, le rôle de l'avocat doit être de donner suite aux volontés du client et de le représenter de la même façon que pour tout autre client.

76. Il devrait y avoir certaines circonstances où cette présomption prévaudrait absolument. Dans chacune de ces situations, l'OSRJH devrait fournir automatiquement un avocat si le client ne peut pas en obtenir un autrement. Il s'agirait des procédures touchant la libération d'une incarcération, procédures devant les conseils consultatifs ou les conseils régionaux et révision, ou procédures d'habeas corpus; toute procédure sur la capacité selon la Loi sur l'incapacité mentale, et les auditions sur la capacité de subir un procès dans le cadre de procédures criminelles.

77. Seuls les avocats indépendants choisis par l'entremise de l'OSRJH à partir d'un barreau spécialisé plutôt que le

Curateur public ou le Tuteur public devraient agir pour un client handicapé dans de telles circonstances.

78. Toute loi qui a trait aux handicapés mentaux devrait être synthétisée et clarifiée de façon à ce que les droits ne soient pas variables selon la région ou l'institution où se trouve le patient handicapé.

79. Il devrait y avoir une révision indépendante du mandat du Curateur public afin de rationnaliser et moderniser son rôle.

80. Le droit à un avocat devrait être automatique pour quiconque est hospitalisé ou confié à une institution à cause d'un handicap mental ou physique.

81. Il faudrait mieux assurer des procédures équitables devant les conseils consultatifs et les conseils régionaux de révision. La *Loi sur l'exercice des compétences légales* devrait s'appliquer.

82. Le gouvernement devrait avoir comme priorité de mettre en vigueur les recommandations du *Rapport de la Commission royale d'Enquête sur la confidentialité des dossiers médicaux en Ontario*, surtout en ce qui a trait aux dossiers psychiatriques.

83. L'OSRJH devrait contrôler l'efficacité de la représentation juridique afin d'assurer que les services soient offerts de façon convenable, et d'assurer aussi que l'on maintienne un très haut niveau de qualité, de discipline et de disponibilité de la représentation.

84. L'OSRJH devrait communiquer au ministère responsable les problèmes et déficiences qu'il identifie pour que le ministère y donne suite.

85. Les moyens financiers ne devraient pas déterminser l'accès à l'OSRJH mais ces services devraient être disponibles à tous les handicapés ou à ceux qui participent à l'offre de services juridiques ou services connexes aux handicapés.

86. L'OSRJH devrait être situé à Toronto, mais devrait pouvoir faire appel à un personnel qualifié dans d'autres régions. Il devrait prévoir l'usage de locaux accessibles à travers la province. Ces locaux seraient partagés avec d'autres bureaux ou agences. Des numéros sans frais devraient être établis à travers la province pour atteindre l'OSRJH ou pour que les bureaux d'aide juridique au niveau local puissent transmettre les communications.

87. Le Procureur général devrait aller de l'avant avec des modifications aux procédures régissant le recours collectif se fondant sur les recommandations de la Commission sur la réforme du droit de l'Ontario. Une procédure efficace de recours collectif serait très utile pour aider les groupes de personnes handicapées à avoir recours aux tribunaux pour préciser leurs droits selon la Charte canadienne des droits et des libertés ou selon toute autre législation.

88. L'aide juridique devrait prévoir de façon plus généreuse l'obtention des certificats par les groupes selon la Loi sur l'aide juridique, afin que le recours collectif puisse être utilisé en faveur des groupes de personnes démunies.

89. Le gouvernement devrait considérer d'imposer l'obligation au personnel des institutions à soins médicaux telles que les hôpitaux, institutions, foyers nourriciers, foyers pour personnes âgées, de rapporter les cas de mauvais traitements aux autorités pertinentes. On devrait prévoir aussi des mesures pour empêcher toutes représailles contre le personnel qui rapporterait de tels mauvais traitements.

90. La loi devrait prévoir le droit d'accès sans entraves à un conseiller, avocat ou membre de la fami-le qui veut visiter un patient dans une institution mentionnée à la Recommandation 89

91. Afin d'encourager les rénovations visant à améliorer l'accès aux édifices, la Loi sur l'impôt sur le revenu devrait être modifiée de façon à prévoir des déductions pour toutes dépenses de modification d'édifices dans ce sens.

92. La personne handicapée devrait pouvoir déduire de son revenu, en application de la Loi sur l'impôt sur le revenu, toutes dépenses pour les biens et services directement attribuables à son handicap. Les frais additionnels nécessaires pour l'accès à l'information tel que la technologie spécialisée, qu'il s'agisse du braille, de l'ordinateur ou de gros caractères, devraient aussi pouvoir faire l'objet de déductions.

93. La Société du barreau, le Cours d'admission au barreau, et la formation professionnelle permanente devraient insister davantage sur le droit ayant trait aux personnes démunies en général, et en particulier, aux droits et aux besoins des handicapés.

94. Lorsqu'il est possible de le faire, on devrait impliquer les handicapés eux-mêmes dans la mise sur pied de programmes

visant à sensibiliser le public et la profession juridique, y compris la magistrature, aux besoins et aux problèmes spéciaux des handicapés.

95. On devrait inclure une discussion sur les difficultés ayant trait à la capacité d'un individu de donner des instructions à son avocat dans le Code de déontologie de la Société du barreau du Haut-Canada.

96. La Société du barreau devrait modifier son commentaire 4 de la règle 14 du Code de déontologie et inscrire "handicapé" ou "infirmité" en tant que motif de discrimination prohibé.

97. Les facultés de droit et le cours de formation professionnelle du barreau devraient entreprendre des efforts spéciaux pour s'assurer que l'étudiant en droit handicapé puisse avoir accès plus facilement aux cours, aux matériaux et aux examens.

98. Les Règles de pratique devraient être modifiées de façon à prévoir qu'un avocat qui agit de bonne foi et croit raisonnablement qu'un client avait la capacité de lui donner des instructions, ne soit pas personnellement responsable pour des frais s'il est déterminé plus tard que cette croyance n'était pas fondée et que le client n'avait pas cette capacité.

99. Il devrait y avoir une refonte et une réforme de la Loi sur l'incapacité mentale, en fonction des connaissances actuelles sur l'infirmité mentale et en fonction des règles modernes de procédures équitables. Cette révision devrait tenir compte de la jurisprudence établie d'après cette loi, des développements dans d'autres juridiction telles que l'Alberta, et du besoin d'étendre le rôle d'un curateur à des questions

autres que celles ayant trait uniquement aux biens-fonds, c'est-à-dire aux besoins non pécuniaires de celui qui n'a pas la capacité mentale.

100. Afin de prévoir des fonds pour la mise en oeuvre des recommandations de ce rapport, le gouvernement pourrait considérer l'utilisation du surplus accumulé de fonds détenus par le Curateur public. L'article 9(5) de la *Loi sur le Curateur public* prévoit un mécanisme pour l'utilisation de ces fonds. L'usage à cette fin serait analogue au principe "cy-près" du droit des fiducies.